No. 15211

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JOHN T. FEY, Clerk

United States
Court of Appeals
for the Ninth Circuit

THE COWLITZ TRIBE OF INDIANS,
Appellant,

vs.

CITY OF TACOMA, a municipal corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellant.

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City Attorney,

W. L. BROWN, JR.,

Assistant City Attorney,
304 City Hall,
Tacoma 2, Washington,

Attorneys for Appellee.

In the United States District Court for the Western District of Washington, Southern Division

Civil No. 1934

THE COWLITZ TRIBE OF INDIANS,

Plaintiff,

vs.

THE CITY OF TACOMA, a Municipal Corporation,

Defendant.

COMPLAINT

Civil Action (Jury Trial Demanded)

Come now the Cowlitz Tribe of Indians and for their First Cause of Action against the defendant, complain and allege as follows:

I.

That Plaintiff is an Indian Tribe having a tribal organization recognized by the Secretary of Interior of the United States as having authority to represent such tribe and that this claim is presented by the said tribal organization for and on behalf of said tribe.

II.

That the Cowlitz Tribe of Indians held exclusively, possessed, owned, and have occupied since time immemorial, the lands hereinafter described and which are situated in what is known as the Cowlitz River Drainage, in the Southwestern Washington State in Thurston, Lewis, and Cowlitz Counties in the State of Washington, and more partic-

ularly described as the entire drainage area of the Cowlitz River. That the Cowlitz Tribe of Indians have lived separate and apart from all other Indian tribes, having a separate and distinct Indian dialect, occupying and possessing its ancient tribal lands to the exclusion of any other tribe.

III.

That the Cowlitz River bears the name of this ancient and honorable tribe of Indians, that the plaintiff tribe has never transferred the aforesaid ancient tribal lands, or the hunting, fishing, water rights or any other rights appurtenant, thereto. That the Aboriginal Title of the Cowlitz Tribe of Indians has never been extinguished, by any form of transfer whatsoever. That the aforesaid lands and the rights appurtenant thereto as aforesaid remain in fee simple absolute in the plaintiff tribe of Indians, as per Oregon Donations Act of Sept. 27, 1850.

IV.

That the matter in controversy hereunder exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

V.

That this action arises under the Commerce Clause, Article I, Section VIII, of the Constitution of the United States: "The Congress shall have Power * * * To regulate Commerce * * * among the several States * * * and with the Indian Tribes * * *"; also under the Federal Power Act of 1920

as amended to date and (16 USCA sections 791a through section 823); also Section 9 of the Rivers and Harbors Act of 1899 as amended to date (33 USCA Section 401); that defendant herein seeks to deprive the plaintiffs of their rights on the aforesaid River in violation of the Constitution and the said acts of Congress, and including the Fifth Amendment to the Constitution of the United States in that the taking is without just compensation, or any compensation whatsoever, and that defendant is depriving the plaintiff of its rights by violating the aforesaid acts and denying plaintiff of due process of law under the 14th amendment to the Constitution of the United States, as hereinafter set forth.

VI.

That on January 9, 1952 the City of Tacoma passed Ordinance No. 14386 providing for the building of two dams on the Cowlitz River at Mayfield and Mossyrock pursuant to a license issued by the Federal Power Commission Project 2016, on November 27, 1951, under the Federal Power Act (16 USCA 791a through 823). That the Defendant is proceeding to build the said dams and issue bonds for financing the said project in violation of Ordinance No. 14386, of Federal Power Commission License No. 2016, and Washington State Law. That defendant has issued a series of bonds and is attempting to sell the same although the defendant has not and cannot possibly conform to the express requirements of the aforesaid ordinance, license or the Laws of the State of Washington. Since plain-

tiff's rights constitute a cloud on the title and in effect a covenant running with the land, on the Cowlitz River Drainage, the defendant must compensate plaintiffs and quiet its title to said lands and rights appurtenant thereto prior to issuing any bonds or building any dams on the said River. That Ordinance No. 14386 and the order issuing License No. 2016, and the findings of fact attached thereto are hereby incorporated by reference and made a part hereof as though fully set forth herein, verbatim.

VII.

That Plaintiffs for their Second Cause of Action against the defendant complaint and allege as follows:

I.

That all of the allegations of the first cause of action are incorporated herein as though fully set forth.

II.

That plaintiff alleges on information and belief that there are four to six ancient Cowlitz Indian burial grounds situated in the Cowlitz River Drainage which will be inundated if the defendant is allowed to proceed to sell the aforesaid bonds and build the two dams on the Cowlitz River at Mayfield and Mossyrock as provided in the foresaid Ordinance No. 14386 and the Federal Power Commission License No. 2016. That defendant has failed and refused to make any arrangement to move said graves, compensate plaintiffs therefor or make any arrangement whatsoever for disentering and moving

the Cowlitz Indians buried therein, or moving monuments and artifacts; but is in fact wantonly proceeding with its plans for said dams in complete disregard of plaintiffs rights in desecrating the graves of thousands of their loved ones and ancestors. That plaintiffs as a part of their ancient culture revere their ancestors and that the wholesale destruction of same contemplated by defendant constitutes a sacrilegious interference with their Burial Grounds and the spirits of their departed ancestors, in their happy hunting grounds, destroying their peace of mind and invading the sanctity of said Burial Grounds and desecrating the memory of these departed ancestors.

III.

That the plaintiffs are further damaged on this account in that they must disenter, exhume the corpses in the said graves, prepare them for reburial, find and purchase new burial sites, transport them to the new Burial Ground, rebury them with appropriate monuments and ceremonies according to their ancient religious beliefs and customs.

IV.

That plaintiffs are damaged and will be further damaged on this account in the sum of $5,250,861.39.

VIII.

That Plaintiffs for their Third Separate and Distinct Cause of Action allege:

I.

Plaintiffs incorporate herein by reference, each and every allegation contained in their first and second causes of action as though fully set forth herein.

II.

That by act of Congress dated March 2, 1853 (10 Statutes 172), enacted for the purpose of establishing the territorial government of Washington, it was provided in Section 20 that certain lands be set aside for schools and for other purposes set out therein, that under said act a portion of plaintiff's lands as described above were appropriated against the wishes of plaintiff, and until this day plaintiff has made no transfer, cession or any conveyance of any nature whatsoever of any of its aforesaid ancient tribal lands to which it holds aboriginal title nor received compensation for same to this day.

That plaintiff has made no transfer or cession or conveyance of any nature whatsoever of any of the rights appurtenant to or running with aforesaid lands including hunting, fishing, water rights, mineral rights on the aforesaid Cowlitz River or its Drainage. That if defendant is allowed to proceed to sell the aforesaid bonds and, build the two dams on the Cowlitz River at Mayfield and Mossyrock as provided in the aforesaid Ordinance No. 14386 and the Federal Power Commission License No. 2016, the aforesaid fishing rights of the plaintiff will be destroyed and impaired as set out in the findings of said Federal Power Commission, contained in its Order and Findings dated November 27, 1951, and

plaintiff will be damaged in addition to the loss or impairment attributable to fishing rights, and fishery resources indicated in Finding No. 43:

"On the Cowlitz River watershed the total annual gross value due to all fish, regardless of species, attributable to the area above Mayfield, is roughly equal to that below Mayfield, in each case being about one million dollars." (Underscoring supplied.)

That said Finding No. 43 indicates an Annual value of two million dollars for fishery resources, which is admitted by defendant, and which is indicative of the loss annually to plaintiff for only one of the two dams proposed by defendant should defendant be allowed to proceed to sell bonds and erect the two dams as aforesaid. That these figures do not include the loss in futuro to plaintiff on either of the proposed dams. That Plaintiff incorporates by reference as though fully set forth herein Ordinance No. 14386 of the City of Tacoma dated January 9, 1952 and Federal Power Commission License No. 2016, together with the Order and Findings Therein as though fully set forth herein, verbatim.

That plaintiff is damaged or will be damaged on this account in the sum of $48 60,000.00 if defendant is allowed to proceed to sell its bonds and build the two proposed dams on the Cowlitz River.

IX.

That Plaintiffs for their Fourth, Separate and Distinct Cause of Action allege:

I.

Plaintiff incorporates herein by reference, each and every allegation contained in their first, second, and third causes of action as though fully set forth herein.

II.

That the defendant is presently violating the rights of the plaintiff in that no compensation has been paid to the plaintiff for their water rights on the aforesaid Cowlitz River Drainage, although defendant is proceeding to sell bonds and erect two dams on the Cowlitz River and will thereby convert and destroy said rights all to the damage of plaintiffs as hereinafter set forth. That the Ordinance No. 14386 which authorizes the construction of the aforesaid dams provides as follows:

"The construction of the project has been licensed by the Federal Power Commission under Project No: 2016, and the construction herein authorized shall conform with the requirements of such license."

(Emphasis supplied.)

Plaintiffs are informed and believe that Article 28 of said license requires defendant to complete the project in thirty-six months, but that it is physically impossible for defendant to complete both dams in thirty-six months. That plaintiffs are further informed that defendant has made application before the Federal Power Commission, dated June 2, 1955 to extend the period of construction to six years after the commencement of construction, also to reduce the minimum flow requirements un-

der Article 35(a) and (b) of the License. That plaintiff is informed and believes that although these applications have not been granted, defendant is, in effect, proceeding apace, in violation of its own Ordinance, the License under Project No. 2016 and the Laws of the State of Washington, thereby depriving plaintiffs of due process of law under the 14th amendment to the Constitution of the United States and without compensation under the 5th amendment to the Constitution of the United States.

III.

Plaintiffs are informed and believe and therefore allege that their aforesaid property and constitutional rights are being converted and violated in the following particulars, in addition to the foregoing paragraphs of this complaint:

1. The defendant has failed to obtain the required approval of certain officials of the State of Washington as required under R.C.W. 90.28.010;

2. The defendant is proceeding illegally to condemn the State Game Hatchery at Mossyrock, including the water rights appurtenant thereto, although said site is segregated from the public domain and already appropriated to a "public use".

3. That the defendant has obtained no permit to construct aforesaid dams from the Supervisor of Water Resources of the State of Washington as required by R.C.W. 90.28.060.

4. That defendant is proceeding in violation of the Fish Sanctuary Act, chapter 9, Laws of Wash-

ington for 1949, also Sect. 20, Chapter 188, General Laws of Oregon for 1915, and Sect. 116, Chapter 31, Laws of Washington for 1915, ratified by the 65th Congress on April 8, 1918; all in violation of said Oregon-Washington Compact.

IV.

That Plaintiffs are informed and believe, and therefore allege, that defendant is proceeding to issue and sell bonds and let bids for the construction of aforesaid dams, and that plaintiffs will suffer irreparable injury if defendant is not restrained from performing these acts in violation of their rights as aforesaid.

V.

That plaintiffs are damaged, or will be damaged, on this account in the sum of $16,000,000.00, if defendant is allowed to proceed to sell its bonds and build the two proposed dams on the Cowlitz River.

Wherefore Plaintiffs Pray:

1. That defendant be restrained by this honorable Court from proceeding further in the sale of its bonds, or construction of the two dams on the Cowlitz River, until the rights of the plaintiffs can be determined and compensated for herein; and

2. That the Plaintiffs demand judgment against the defendant on their claims in damages by this honorable Court as follows:

(a) The sum of $9,904,000.00 in damages on their First Cause of Action, with interest, until paid.

(b) The sum of $5,250,861.39 in damages on their Second Cause of Action, with interest until paid.

(c) The sum of $48,860,000.00 in damages on their Third Cause of Action, with interest until paid.

(d) The sum of $16,000,000.00 in damages on their Fourth Cause of Action, with interest until paid.

(e) That judgment be entered against defendant for costs and expenses and reasonable attorne s' fees herein.

(f) That plaintiffs have such other and further relief as to the Court may be deemed just and proper.

/s/ MALCOLM S. McLEOD,

/s/ JAMES E. SAREAULT,

Attorneys for Plaintiffs

[Endorsed]: Filed July 20, 1955.

[Title of District Court and Cause.]

ANSWER

In answer to plaintiff's first cause of action set forth in its Complaint, defendant alleges:

I.

It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Paragraph I thereof.

II.

Defendant denies the allegations of paragraphs II and V thereof.

III.

Defendant admits there is a river named the Cowlitz; denies all other allegations of paragraph III thereof.

IV.

Defendant admits the allegations of paragraph IV thereof.

V.

Defendant admits that on January 9, 1952, the City of Tacoma passed Ordinance No. 14386 providing for the building of two dams on the Cowlitz River at Mayfield and Mossyrock pursuant to a license issued by the Federal Power Commission project 2016, issued on November 27, 1951, under the Federal Power Act (16 USCA 791a through 823), and that the defendant is proceeding to build the said dams as alleged in paragraph VI thereof, but denies all other allegations contained therein.

In Answer to Plaintiff's Second Cause of Action set forth in its Complaint, defendant alleges as follows:

I.

Denies every allegation contained in paragraph I thereof except as hereinabove specifically admitted in defendant's answer to plaintiff's first cause of action.

II.

Admits that it has failed to make any arrange-

ments to move any graves to compensate the plaintiff therefor or make any arrangement for disinterring and moving the Cowlitz Indians buried as alleged in paragraph II thereof, but denies all other allegations contained therein.

III.

It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III thereof.

IV.

Denies the allegations of paragraph IV thereof.

In Answer to Plaintiff's Third Cause of Action set forth in this Complaint, defendant alleges as follows:

I.

Denies every allegation contained in paragraph I thereof except as hereinabove specifically admitted in defendant's Answer to plaintiff's first and second causes of action.

II.

Admits that Congress, by act dated March 2, 1853, (10 Stat. 172), established the territorial government of Washington and that in said act certain lands were set aside for schools and for other purposes set out therein, and that Finding No. 43 of the Federal Power Commission contained in its Order and Findings dated November 27, 1951, indicates an annual value of two million dollars for

fishery resources as alleged in paragraph II thereof, but denies all other allegations contained therein.

In Answer to Plaintiff's Fourth Cause of Action set forth in its Complaint, defendant alleges as follows:

I.

Denies every allegation contained in paragraph I thereof except as hereinabove specifically admitted in defendant's Answer to plaintiff's first, second and third causes of action.

II.

Admits that the defendant is proceeding to erect two dams on the Cowlitz River; that Ordinance No. 14386 provides as follows:

"The construction of the project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized shall conform with the requirements of such license."

That Article 28 of said license requires the defendant to complete the project in thirty-six months, and that the defendant has made application before the Federal Power Commission, dated June 2, 1955, to extend the period of construction to six years after the commencement of the construction and to reduce the minimum flow requirements under Article 35(a) and (b) of the license, alleged in paragraph II of plaintiff's fourth cause of action, but denies all other allegations contained in paragraph II thereof.

III.

Denies all of the allegations in paragraphs III, IV and V thereof.

Further answering Plaintiff's Complaint and as defenses thereto, defendant alleges:

First Defense

The Court has no jurisdiction of this cause, because all plaintiff's claims are based solely on aboriginal or Indian title, and the issues raised herein are political and are not judicial. In the absence, as here, of Congressional recognition of such title and specific authority for the plaintiff to sue for violation of any alleged rights so recognized, this Court has no jurisdiction over either the subject matter of this suit or the parties hereto, the plaintiff's only recourse being the prosecution of its claims against the United States under the provisions of the Indian Claims Act, which course it is pursuing, as more particularly set forth in plaintiff's Exhibit 2 and 3 which are annexed hereto.

Second Defense

The Court has no jurisdiction of this cause, because the plaintiff has no rights whatsoever, either legal or equitable, that are enforceable herein; all rights, if any, that the plaintiff may have had in the lands and rights pertaining and appurtenant thereto and involved herein, have been long extinguished by various acts of the Congress of the

United States and the issuance of patents and grants pursuant thereto (except as still owned by the U. S.) by the United States Government, copies of which patents, grants or conveyances, and index thereof, are marked as defendant's Exhibit "1" and annexed hereto.

Third Defense

The Court has no jurisdiction of this cause, because the Complaint does not show on its face that the action is one arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal Courts; the action is between citizens of the same state, to-wit, the State of Washington, and the issues involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the State courts have exclusive and original jurisdiction.

Fourth Defense

That the Complaint fails to state a claim upon which relief can be granted.

Fifth Defense

That the plaintiff has now pending before the Indian Claims Commission of the United States a claim for compensation and damages for the taking of the lands and rights by the United States Government, which claim includes all of the lands and rights herein alleged by the plaintiff to have been taken or invaded by the defendant. In said Petition and claim the plaintiff, through its authorized member, Simon Plamondon, in writing and sworn to

under oath, acknowledged that the plaintiff had been forcibly removed from its lands shortly after 1855 and their lands opened to American settlers by the United States Government. A copy of plaintiff's said Petition and a copy of the Government's Answer thereto, Docket No. 218 before the said Indian Claims Commission, are annexed hereto and marked Plaintiff's Exhibits "2" and "3" respectively.

Sixth Defense

The claims stated in the Complaint did not accrue within ten years before the commencement of this action and are therefore all barred by the provisions of Revised Code of Washington 7.28.010 to 7.28.100, both inclusive, and 7.28.280, because all of the land acquired or to be acquired by defendant in the building of said dams was granted or patented by the United States Government in compliance with law, to defendant's predecessors in title, as shown by defendant's Exhibit "1" which is annexed hereto and above mentioned.

Seventh Defense

Plaintiff is not entitled to maintain this action by reason of laches and estoppel. The defendant and defendant's predecessors in title ever since acquiring original title from the United States Government have been in open, continuous and notorious possession of all the said real property and of all rights and privileges pertaining thereto and which the plaintiff alleges have been invaded by defend-

ant, and have improved and expended large sums of money in connection with improving and developing of said lands and rights in connection therewith, all with full knowledge of the plaintiff and with no attempt on the part of the plaintiff to obtain a judicial determination of its alleged right in respect thereto; that *defendant* is now estopped from asserting any claim against the defendant.

Eighth Defense

If the plaintiff ever had any interest in the lands or rights herein involved, as claimed by the plaintiff (which is denied), the same has been abandoned and relinquished by the plaintiff and its members, because for many years last past and prior to the commencement of this action the plaintiff and its members have not used or utilized any of the rights and privileges claimed herein, or resided in conformity with their claims upon the said property herein involved, and have made no attempt until the bringing of this action to enforce in any way or in any court any such rights or privileges as herein claimed.

/s/ CLARENCE M. BOYLE,
City Attorney

/s/ MARSHALL McCORMICK,
/s/ FRANK L. BANNON,
Chief Assistant City Attorneys
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

MOTION AND APPLICATION FOR A PRELIMINARY HEARING PURSUANT TO RULE 12(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendant moves and makes application in accordance with Rule 12(d) of the Federal Rules of Civil Procedure for an Order granting a preliminary hearing before trial for the hearing and determination of defendant's First, Second, Third and Fourth Defenses, separately stated in defendant's Answer on file herein.

Said defenses are as follows:

First Defense

The Court has no jurisdiction of this cause, because all plaintiff's claims are based solely on aboriginal or Indian title, and the issues raised herein are political and are not judicial. In the absence, as here, of Congressional recognition of such title and specific authority for the plaintiff to sue for violation of any alleged rights so recognized, this Court has no jurisdiction over either the subject matter of this suit or the parties hereto, the plaintiff's only recourse being the prosecution of its claims against the United States under the provisions of the Indian Claims Act, which course it is pursuing, as more particularly set forth in plaintiff's Exhibits "2" and "3" which are annexed to defendant's Answer.

Second Defense

The Court has no jurisdiction of this cause, because the plaintiff has no rights whatsoever, either legal or equitable, that are enforceable herein; all rights, if any, that the plaintiff may have had in the lands and rights pertaining and appurtenant thereto and involved herein, have been long extinguished by various acts of the Congress of the United States and the issuance of patents and grants pursuant thereto (except as still owned by the U. S.) by the United States Government, copies of which patents, grants or conveyances, and index thereof, are marked as defendant's Exhibit "1" and annex to defendant's Answer.

Third Defense

The Court has no jurisdiction of this cause, because the Complaint does not show on its face that the action is one arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal Courts; the action is between citizens of the same state, to-wit, the State of Washington, and the issues involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the state courts have exclusive and original jurisdiction.

Fourth Defense

The Complaint fails to state a claim upon which relief can be granted.

This Motion is based upon the Affidavit of Marshall McCormick containing a statement of reasons, and upon the citation of authorities contained in defendant's Brief attached hereto, and upon the records and files herein.

/s/ CLARENCE M. BOYLE,
City Attorney

/s/ MARSHALL McCORMICK,
/s/ FRANK L. BANNON,
Chief Assistant City Attorneys
Attorneys for Defendant

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

AFFIDAVIT AND STATEMENT OF REASONS ON MOTION FOR PRELIMINARY HEARING

State of Washington,
County of Pierce—ss.

Marshall McCormick, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant City above named, and makes this affidavit and Statement of Reasons in support of the defendant's Motion and Application for a Preliminary Hearing, upon the First, Second, Third and Fourth Defenses asserted by the defendant in its Answer on file

herein, as provided for in Rule 12(d) of the Federal Rules of Civil Procedure.

That defendant has asserted in said Answer, in addition to other defenses therein separately stated, four defenses in the categories authorized under Rule 12(b) of the Federal Rules of Civil Procedure, said defenses being set forth in defendant's Motion, to which this affidavit is attached.

That these defenses are defenses which should be determined before trial by preliminary hearing, as provided for in said Rule 12(d) above mentioned.

That annexed to defendant's Answer are defendant's Exhibits "1", "2" and "3", and attached to defendant's Motion for a Preliminary Hearing is defendant's Brief; that said exhibits and Brief, pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, are incorporated herein as a part hereof by this reference thereto.

That, as shown by the facts set forth in these instruments on file herein which must be admitted by the plaintiff, the plaintiff at no time had nor does it have now any claims to the title or any rights pertaining or appurtenant to the lands involved herein that are enforceable in this court or in any other court, and the plaintiff has no legal or equitable right whatsoever to bring this suit or any other suit involving these issues against the defendant.

This court is a court of limited jurisdiction and has not been vested by any act of Congress or other proper authority with jurisdiction to litigate the issues involved herein. The authorities uniformly

hold that the plaintiff, under its claim of aboriginal or Indian title, has no rights whatsoever that are enforceable in any court unless and until such rights are expressly recognized by the Congress of the United States and specific authority is given to the Indians to enforce such rights. Here in this case there are no allegations whatsoever that these rights have ever been recognized by the Congress or that any authority has ever been given upon which suit could be brought.

Consequently, from the facts which the Court can consider which much be admitted by the defendant as they are uncontradictable, it is clear and beyond dispute that this court has no jurisdiction of the subject matter herein involved or of the parties hereto.

It then must necessarily follow that, having no enforceable rights whatsoever against the defendant, the Complaint of the plaintiff fails to state a claim upon which any relief can be granted.

This being the case, the court should grant the defendant's Motion and Application for a Preliminary Hearing to hear and determine these defenses asserted by the defendant and above set forth. This will eliminate further useless litigation between the parties and determine the issues herein involved upon such preliminary hearing without the necessity of any further proceedings.

Dated this 30th day of September, 1955.

/s/ MARSHALL McCORMICK

Subscribed and Sworn to before me this 30th day of September, 1955.

[Seal] /s/ W. L. BROWN, JR.,
Notary Public in and for the State of Washington, residing at Tacoma.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER BY ADDING PRAYER

Comes now the defendant and, as a matter of course pursuant to Rule 15(a) of the Rules of Civil Procedure for the United States District Courts, amends its Answer on file herein by adding thereto a prayer as follows:

Wherefore, defendant prays that the plaintiff take nothing by its action herein and that all causes of action be dismissed against the plaintiff with prejudice and with costs assessed against the plaintiff as provided for by law, and for such other and further relief as the Court deems just and equitable.

/s/ CLARENCE M. BOYLE,
City Attorney
/s/ MARSHALL McCORMICK,
/s/ FRANK L. BANNON,
Chief Assistant City Attorneys
Attorneys for Defendant

[Endorsed]: Filed October 19, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF ISAAC IKE KINSWA

State of Washington,
County of Lewis—ss.

Isaac Ike Kinswa, being first duly sworn on oath, deposes and says:

That he is an American Indian, member of the Cowlitz Tribe of Indians and lives at Ethel, in Lewis County, Washington. That he is 51 years of age; that he is the son of John Ike Kinswa and the grandson of Isaac Ike Kinswa after whom affiant was named. That affiant was born at Vader, Lewis County, Washington and has lived his entire lifetime in the valley of the Cowlitz, living most of the time near Silver Creek, Washington, which is near the two proposed dam sites where the City of Tacoma proposes to erect two dams.

Affiant knows that there are several Indian burial grounds which will be inundated in the event said dams are constructed, one of said burial sites being at Nesika, Washington, the other at Harmony, Washington, near the bridge across the Tilton River. That the second of said burial grounds bears the name of affiant's family and is known as the Ike Cemetery and that there are several members of affiant's family buried there in addition to many other Indians not related to affiant.

That affiant is informed by his father and other older relations that there were other burial grounds in the vicinity of Harmony, the exact location of

which is not known to your affiant. However, your affiant has seen the burial grounds at Nesika, the Ike Cemetery, another cemetery now on the Core place, all of which cemeteries have grave markers indicating particular graves.

That affiant has fished in the Cowlitz River to a limited extent and that his ancestors fished there prior to the coming of the white man and that any and all rights which the Cowlitz Indians had in the lands in the valley of the Cowlitz River and rights which they had in the waters of the Cowlitz River have not been extinguished by treaty, transfer or otherwise and that the title to said lands still remains in the Cowlitz Tribe of Indians.

/s/ ISAAC IKE KINSWA

Subscribed and sworn to before me this 6th day of December, 1955.

[Seal] JAS. E. SAREAULT,
Notary Public in and for the State of Washington, residing at Chehalis.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF SARAH CASTAMA

State of Washington,
County of Lewis—ss.

Sarah Castama, being first duly sworn on oath, deposes and says that she is an American Indian

and a member of the Cowlitz Tribe. That she does not know her exact age but believes it to be about 98 years. That she now resides at Silver Creek, Washington, which is near her birthplace, which was Mossyrock, Washington. That she has never lived out of the vicinity where she now resides and has spent her entire lifetime in the same area, which is in the valley of the Cowlitz River. That she is the daughter of Louie Cotomas. That she does not recall the name of her paternal grandfather, although she recalls him when she was a small child, he having died while she was very young.

That she knows that the members of her tribe had several burial grounds in the neighborhood in which she was born and raised, one of said burial grounds being at Nesika, Washington, which burial ground was known as Swik-Swik, where many Indians were buried until approximately 20 years ago. That another burial ground was near the site of the present bridge crossing the Tilton River in the vicinity of Harmony, Washington, one of these being known as the Ike Cemetery where affiant's husband Jack Castama is buried, also all of her 14 children are buried there.

That in addition to the Ike Cemetery there is another in the near neighborhood known as Kallasas Cemetery and another known as Imptsch Cemetery, and a very large burial ground near the mouth of the Tilton River known as Lal-lalk, which burial ground contained many bodies, possibly several hundred, and which burial ground was used

long before the coming of the white men, all burials before the coming of the white men being above the ground on platforms and usually in the canoe of the dead man, if he had one. That after the coming of the white man, burials in this large cemetery were in the ground. That affiant does not know the number of the bodies buried in these several cemeteries but feels that there were several hundred since there was a large settlement a short distance up the river from these burial grounds.

That your affiant is informed and believes that the burial grounds above described will all be under water if the dams as proposed by the City of Tacoma are built.

That affiant, as do the other members of her tribe, as a part of their ancient culture, revere their ancestors and the defendant in the above entitled cause would be interfering with their religious views by inundating the graves of their ancestors, thereby desecrating said graves, all of which acts on the part of the defendant would constitute a sacrilegious interference with the burial grounds of said Indians and the spirits of their departed ancestors and destroying the peace of mind of affiant and other members of her tribe by invading said burial grounds and inundating the same by the construction of said dams.

That the members of the Cowlitz Tribe of Indians have fished in the waters of the Cowlitz River and operated their canoes thereon from time immemorial and still fish in said river to a limited extent. That the aboriginal title of the Cowlitz

Indians in the lands of the water shed of the Cowlitz River and in the waters of the Cowlitz River have never been extinguished by any form of transfer whatsoever, treaty or otherwise, and that the said lands and rights appurtenant thereto remain in fee simple in said Indians.

/s/ SARAH (her mark X) CASTAMA

Witnesses to Mark:
/s/ ISAAC IKE KINSWA
/s/ MARIE F. SPRAGUE

Subscribed and sworn to before me this 6th day of December, 1955.
[Seal] /s/ JAS. E. SAREAULT,
Notary Public in and for the State of Washington, residing at Chehalis.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF MALCOLM S. McLEOD

State of Washington,
County of King—ss.

Malcolm S. McLeod, first being duly sworn, upon oath deposes and says: That he is one of the attorneys for the plaintiff Tribe of Indians, that he makes this affidavit for and behalf of said tribe in support of the complaint on file herein.

That in Thurston County Cause No. 26572 over

the verification of Mayor H. M. Tollefson the following judicial admissions are made by the plaintiff in its "Amended Complaint":

Paragraph I that the City of Tacoma operates "plants and facilities for the generation, transmission and distribution of electricity under RCW 80.40.010".

Paragraph III that plaintiff adopted Ordinance 14386 on January 9, 1952 with amendments.

'Paragraph IV that in accordance with the plan and system specified and adopted in said Ordinance No. 14386 as amended as aforesaid, plaintiff proposes to construct the works, plants and facilities therein described, including an impounding dam, with spillway, of a height of above tailwater 325 feet at about Mile 65, and a concrete diversion dam, with spillway, of a height above tailwater of 185 feet at about Mile 52, on the Cowlitz River in Lewis County, Washington; and proposes to use the surplus funds of its electric generating plant and system insofar as the same may be available for that purpose, and to issue and sell its utility revenue bonds in an amount, not exceeding $146,000,000, sufficient to pay the remainder of the costs of said development."

That by these admissions the defendant has clearly embarked on a "present unlawful taking" of the property of plaintiff without any compensation whatsoever, for its rights or property.

That in the plaintiff's Reply and Answer to Amended Cross-Complaint in Thurston County

Cause No. 26572, the following judicial admissions were made by defendant:

That the State Court is not the tribunal for action on property to be condemned by the City of Tacoma "and that this is not the proper proceeding or tribunal for the determination of any such suit or question pertaining thereto." (referring to eminent domain as to State and private property by the City of Tacoma).

Paragraph IV of Answer to Amended Cross-Compkaint: "* * * Plaintiff (City of Tacoma) admits that it has entered into a construction contract for the first of said dams and is presently proceeding therewith in conformity with the previous decision and orders in this Cause * * *"

Paragraph V of Answer to Amended Cross-Complaint: "* * * admits that said river is used and capable of use for navigation * * *"

Paragraph VII: "* * * Plaintiff admits passage of the Game Commission of the resolution referred to therein * * *" Resolution incorporated herein as Exhibit "A" and attached hereto.

Paragraph VIII: "* * * that such project when completed will result in the inundation of several miles of State Highway * * *"

Paragraph X: "* * * admits allegations in paragraph VIII * * *" (State of Washington, Cross-Complaint)

"* * * That the City of Tacoma has commenced construction of the Mayfield dam project intending to use and divert the waters of the Cowlitz River,

without having first received water appropriation permit from the Supervisor of Water Resources, as required under R.C.W. 90.20.010 et seq."

Paragraph XI: "* * * plaintiff admits that it has commenced initial construction of said project and has made application to said commission for certain amendments to its license, including an extension of time largely made necessary by defendant Directors continued personal opposition to such project * * *"

In Cause No. 26572 Thurston County, Washington in "Restraining Order Pendente Lite" over the signature of Charles Wright, Judge and Frank L. Bannon, attorney for City of Tacoma, the following language occurs:

"Provided However, that the plaintiff (City of Tacoma), its agents, employees and officers, be and they are hereby authorized to construct the coffer dam for the powerhouse site * * *"

That from the foregoing judicial admissions it is obvious that defendant is proceeding apace with its dam project in violation of the rights of plaintiff in general and in particular under the due process clause of the 14th amendment.

That the Congress of the United States has never extinguished the title of the Cowlitz Indians to their lands, hunting, fishing, water, mineral, berrying, root gathering or other rights in the Cowlitz river watershed.

That these facts are covered in the affidavits of Isaac Ike Kinswa and Sarah Castama in support

of the Complaint. That numerous Cowlitz Indians make their living by fishing in the Cowlitz river and the acts of the plaintiff will deprive them of their livelihood.

That said affidavits set out the family burials of the two affiants which affidavits could be duplicated by numerous Cowlitz Indians who live in a portion of the aboriginal Tribal Lands of the Cowlitz Indians. All of which evidence on burials and property rights will be presented.

That your affiant is informed that Tacoma Utilities Director Dean Barline has notified the City Council that Tacoma Light Department funds will finance about six to eight months work on Mayfield Dam. That your affiant is further informed that defendant is building the Mayfield Dam. That your affiant is further informed that defendant is building this Mayfield Dam and expects to complete (90%) ninety per cent of said dam. By the present ruling of Judge Charles T. Wright under a restraining order issued by his Thurston County Superior Court, and further Mr. Dean Barline informed the Tacoma City Council that the Tacoma City Utilities board had felt it "mandatory" to begin construction on the Mayfield dam before December 1955, in order to comply with requirements of the license issued by the Federal Power Commission. That if these facts are correct, the defendant is at this very moment actually constructing said dams.

That many of the plaintiffs are semi-civilized

"blanket Indians" speaking little if any English and are existing under circumstances of the most dire poverty and have no means with which to oppose the taking of their property by the City of Tacoma. That these Indians are appealing to this court as a court of equity. Appreciating the fact that their lands and rights in the Cowlitz River Watershed are valuable they cannot stand on an equal footing with the defendant, the City of Tacoma. Since defendant proposes to set up a business costing $146,000,000 which will produce an income of $2,000,000.00 per year, the defendant should be required to proceed to compensate the Indians for their rights in an orderly and lawful manner.

That attached hereto and made a part hereof as Exhibit B, is a true copy of a map compiled by the U. S. Army in 1858 which shows that a portion of the Cowlitz Indian Tribal lands covered the watershed of the Cowlitz River, as claimed by plaintiff in the case at Bar.

/s/ MALCOLM S. McLEOD

Subscribed and sworn to before me this 7th day of December, 1955.

[Seal] /s/ WING C. LUKE,
Notary Public for the State of Washington, residing at Seattle.

EXHIBIT "A"

The following resolution of the State Game Commission for the State of Washington was adopted at its meeting held in Seattle, Washington on August 16, 1955.

Motion by Snider, Seconded by Dow, that the City of Tacoma having expressed a need and desire to acquire the Mossyrock fish hatchery, held and operated by the State for Game Department purposes since 1941, which hatchery must be inundated and made completely useless by the Mayfield dam on the Cowlitz River as proposed by the City of Tacoma's ordinance No. 14386; and the Commission having instructed its Director to thoroughly investigate the feasibility of transferring said hatchery to said City pursuant to law; and the Director, after a thorough search and investigation, having reported:

(1) that no alternate hatchery site can be found which has values to any extent comparable to those of the Mossyrock site with respect to the unique character and location of the spring waters utilized there; and

(2) that the fish trapping and other operations being conducted on the Cowlitz River make the hatchery indispensable to the operations of the Department;

(3) that cyclic steelhead experiments carried on at the hatchery in connection with the Cowlitz River require the use of the hatchery for a period

of years before any beneficial data can be obtained;

(4) that stocks of steelhead and cutthroat trout are being reared at the hatchery to further and to carry on the endeavors and purposes of the Department;

Therefore, the Commission finds the Mossyrock hatchery, in its present location, to be complete irreplaceable and essential to the maintenance of its fishery program on the Cowlitz River, and necessary for the purposes for which it was acquired, and instructs the Director to take every legal procedure to resist any effort on the part of the City of Tacoma, or anyone else, to condemn or in any other manner acquire or impair the operations of the Mossyrock hatchery, as such acquisition or impairment would be disadvantageous to the State of Washington and inconsistent with the public interest.

Dated at Seattle, Washington this 16th day of August, 1955.

Washington State Game Commission

/s/ Dr. W. R. Bernard, Chairman
/s/ Richard S. Seward, Member
/s/ J. A. Lawson, Member
/s/ Walt Fano, Member
/s/ Claude C. Snider, Member
/s/ (Illegible) Dow, Member

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF DR. HERBERT C. TAYLOR, Ph.D., Anthro-Archeologist for the Cowlitz Tribe of Indians

State of Washington,
County of King—ss.

Dr. Herbert C. Taylor, Jr., first being duly sworn upon oath, deposes and says that he is a qualified anthropologist and archeologist, that he makes this affidavit for and on behalf of the aboriginal group, of tribe of Indians, known as the Cowlitz Tribe of Indians, and the mimeographed report consisting of fifteen pages with a Bibliography of ten pages. That this study was made specifically for the Cowlitz Tribe of Indians.

That your affiant respectfully submits his affidavit for the consideration of this honorable Court on behalf of the Cowlitz Tribe of Indians, with the truth of the facts contained being the sole criterion for my investigation.

/s/ HERBERT C. TAYLOR, JR., Ph.D.

Subscribed and sworn to before me this 9th day of December, 1955.

[Seal] /s/ M. S. McLEOD,
Notary Public for the State of Washington, residing at Seattle.

Anthropological Report on the Cowlitz Indians

Statement of the Problem

The writer has been asked to prepare a brief paper on the Cowlitz Indians. This paper is to include:

1. A description of the aboriginal tribal identity of the Indians currently known as Cowlitz.
2. A statement of territory occupied by the Cowlitz Indians.
3. A description of the ecology and land tenure of the Cowlitz.
4. A statement of the probable effect of the building of the Mossy Rock and Mayfield Dams upon Cowlitz archaeological sites and graveyards.

In order to spare the reader who is concerned only with a summary the tedium of reading the body of the evidence, the writer summarizes his conclusions on the next two pages and presents the body of evidence in the pages following.

Conclusions

1. The Cowlitz, as they are currently known, were not in aboriginal times one tribe but two. These tribes were different in language, linguistic family, linguistic stock and culture. The Indians occupying the Lower Cowlitz drainage were Cowlitz proper who spoke a coast Salishan language of the Salishan linguistic stock. They had a typical river-

ine, lower Northwest coast culture depending primarily upon fishing and secondly upon hunting and gathering for their subsistence. They were not normally politically united although occasionally for purposes of war and negotiation they banded together under one of their more powerful chiefs or head men. In normal times the lower Cowlitz villages were quasi-autonomous, however, they were an identifiable ethnic unit. Hudson's Bay Company officials, missionaries and early historians all refer to them as the Cowlitz or Lower Cowlitz Indians. They all spoke the same language and had a collective name for themselves—the Stlpulimuhkl.

The Indians inhabiting the upper reaches of the Cowlitz were Plateau in cultural tradition and Sahaptin in linguistic stock. Their subsistence was based about equally upon hunting and fishing, the women gathering nuts, berries and roots. These Indians were called "Taidnapam". They were recent immigrants into the region from the headwaters of the Lewis River across the Cascades. The tentative map of tribal and linguistic distribution on the Lower Northwest coast does not show the Taidnapam since its base year is 1820 and the writer is not sure that they had moved into the area in force by that time.

2. In 1820 the Lower Cowlitz occupied the drainage of the Cowlitz River from approximately where Mossy Rock stands today to within a few miles of its juncture with the Columbia. In the period between 1820 and 1850, the Cowlitz moved onto the Columbia itself in the region immediately north

and immediately south of the mouth of the Cowlitz —they there intermarried with the remnants of the Chinookan people who had previously occupied the region. The Taidnapam occupied the drainage of the upper Cowlitz from the area about Mossy Rock to the various headwaters of the Lewis River on the other side of the watershed. The Taidnapam ranged as far north westward as the drainage of the Newaukam and as far north as the watershed between the Cowlitz River and the Nisqually River.

3. Both the Cowlitz and the Taidnapam depended heavily upon saimon fishing. Fishing was done by means of fish weirs, by spear fishing and probably by netting and lines. Each village tended to own or possess primary right to desirable fishing locations and most of the permanent villages were located on or near desirable fishing sites. The Taidnapam ranged rather widely in their search for deer, bear, and elk, covering the area drained by the upper Cowlitz and the headwaters of the Lewis and the adjacent mountain country. The Lower Cowlitz hunted, although, not so extensively over the drainage area of the lower regions of the Cowlitz and extending in the north into the drainage area of the Chehalis. In comparatively late times, circa 1820-1850, the Lower Cowlitz moved into the hunting territory of the Willapa, the Willapa having been almost entirely destroyed by disease.

4. In the absence of complete archaeological survey records for the upper Cowlitz River the writer cannot get a very adequate answer concerning the degree to which Cowlitz archaeological sites and

graveyards shall be damaged by flooding resulting from dam construction. The writer has observed two nineteenth century post-Christian (Pre-contact Cowlitz placed their dead in trees or on platforms or in small "Dead Houses.") burial sites, which will be inundated by the proposed lakes.

The Indians report several old village sites in the region which will also be inundated. (One at Riffe and another above Mossy Rock and a third more vaguely located as between Mossy Rock and Mayfield.)

The third site was Lower Cowlitz and the two former sites are upper Cowlitz or Taidnapam.

The Historical Data

The primary historical sources are based upon Hudson's Bay Company reports, the reports of explorers for the British, American governments and finally of the missionaries, voyageurs and American farmers who settled in the Cowlitz valley, circa 1837-1855.

The name Coweliske is first mentioned in Lewis and Clark on Wednesday, November 6, 1805:

Wednesday, 6th. The morning was cool, wet, and rainy. We proceeded at an early hour between the high hills on both sides of the river, till at the distance of four miles we came to two tents of Indians in a small plain on the left, where the hills on the right recede a few miles from the river, and a long narrow island stretches along the right shore.

Behind this island is the mouth of a large river a hundred and fifty yards wide, and called by the Indians, Cowcliske. We halted for dinner on the island, but the redwood and green briars are so interwoven with the pine, alder, ash, a species of beech, and other trees, that the woods form a thicket which our hunters could not penetrate. Below the mouth of the Coweliske a very remarkable knob rises from the water's edge to the height of eighty feet, being two hundred paces round the base; and as it is in a low part of the island, and some distance from the high grounds, the appearance of it is very singular. On setting out after dinner we overtook two canoes going down to trade; one of the Indians, who spoke a few words of English, mentioned that the principal person who traded with them was a Mr. Haley, and he showed a bow of iron and several other things which he said Mr. Haley had given him. Nine miles below that river is a creek on the same, and between them three smaller islands; one on the left shore, the other about the middle of the river, and a third near the lower end of the long narrow island, and opposite a high cliff of black rocks on the left, sixteen miles from our camp. Here we were overtaken by the Indians from the two tents we passed in the morning, from whom we now purchased wappatoo roots, salmon, trout, and two beaver skins, for which last we gave five small fishhooks. At these cliffs the mountains, which had continued high and rugged on the left, retired from the river, and as the hills on the other side had left the water at the Cowel-

iske, a beautiful extensive plain now presented itself before us.[1]

The Indians whom Lewis and Clark saw at the mouth of the Cowlitz were evidently Chinook—perhaps Clackamas Chinook (For instance, see Hodge 1912 and Swan 1952 and note following reference).

The first mention of the Cowlitz proper comes from Gabriel Franchere, a French Canadian clerk in the employ of Astors Fur Company based out of Astoria:

'On the 4th, in the morning, we arrived at a large village of the same name as that which we had passed the evening before, Kreluit, and we landed to obtain information respecting a considerable stream, which here discharges into the Columbia, and respecting its resources for the hunter and trader in furs. It comes from the north, and is called Cowlitzk by the natives. Mr. M'Kay embarked with Mr. de Montigny and two Indians, in a small canoe, to examine the course of this river, a certain distance up. On entering the stream, they saw a great number of birds, which they took at first for turkeys, so much they resemble them, but which were only a kind of carrion eagles, vulgarly called turkey-buzzards. We were not a little astonished to see Mr. Montigny return on foot and alone; he soon informed us of the reason: having ascended the Kowlitzk about a mile and a half, on rounding

[1] Lewis & Clark, 1903, Vol. II pp. 71-72.

a bend of the stream, they suddenly came in view of about twenty canoes, full of Indians, who had made a rush upon them with the most frightful yells; the two natives and the guide who conducted their little canoe, retreated with the utmost precipitancy, but seeing that they would be overtaken, they stopped short, and begged Mr. M'Kay to fire upon the approaching savages, which he, being well acquainted with the Indian character from the time he accompanied Sir Alexander M'Kenzie, and having met with similar occurrences before, would by no means do; but displayed a friendly sign to the astonished natives, and invited them to land for an amicable talk; to which they immediately assented. Mr. M'Kay had sent Mr. de Montigny to procure some tobacco and a pipe, in order to strike a peace with these barbarians. The latter then returned to Mr. M'Kay, with the necessary articles, and in the evening the party came back to our camp, which we had fixed between the villages. We were then informed that the Indians whom Mr. M'Kay had met, were at war with the Kreluits.[49] [2]

Subsequently, the Hudson's Bay Company carried on extensive trade with the Cowlitz Indians

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[49] A party of Cowlitz Indians, no doubt, from whom the river takes its name. They were a large and powerful Salishan tribe, less in touch with traders than the Skilloots (Kreluits). Cowlitz river is an important northern tributary of the Columbia, through whose valley the Washington branch of the Northern Pacific Railway now passes.—Ed.

[2] Thwaites, 1904, Vol. VI, p. 244 et seq.

whom they recognized as a tribe. It will be noted that, evidently, the Hudson's Bay Company regarded one man as over-chief:

Just at the time of Oskononton's arrival at that place, a party of his countrymen were fitting out for a hunting and trapping expedition to the Cowlitz quarter, and he unfortunately joined it. The party, however, had not been long there, before they got into trouble with the natives, and in an affray, poor Oskononton, in trying to rescue one of his companions, was murdered. After this tragical affair, in which it was stated our trappers were the aggressors, the Iroquois had to make a precipitate retreat, abandon their hunting-ground, and make the best of their way back again to Fort George.

The Iroquois had no sooner returned than they gave Mr. Keith to understand that the Indians had, without the least provocation, killed one of their party and wounded two others. A deed so atrocious, and a story so plausible, had its effect at Fort George. Placing, therefore, implicit faith in the report of the Iroquois, Mr. Keith, with a view to investigate the matter, punish the murderers, and settle the affair, fitted out, without delay, a party of between thirty and forty men, chiefly Iroquois—the very worst men in the world for such a business—and gave the charge to Mr. Ogden, an experienced clerk of the northwest school. On reaching the Cowlitz, all their inquiries were fruitless; they could find no offenders, until they got the assistance of How-How, one of the principal chiefs of the place, who conducted them

to the very spot, little thinking that he would have cause to regret his friendly assistance.

In their approaches to the Indians, Mr. Ogden cautioned the Iroquois to be guarded in their conduct, and do nothing until he first showed them the example; some then went one way, some another, making their way through the thickets and bushes. But a party of the Iroquois, happened to reach the Indian tents before Mr. Ogden, and instead of waiting for orders, or ascertaining whether those they had found were or were not the guilty persons, the moment they got within gunshot of the Indians they fired on all they saw; and before Mr. Ogden or How-How could interpose, twelve persons, men, women, and children, were killed. Nor is it known to this day who were the guilty persons! Even after Mr. Ogden had arrived, and tried to stop them, one more was shot; and, to crown their guilt, our people scalped three of their victims.

The quarrel in which Oskononton lost his life arose from our trappers interfering with the Indian women, which brought down on them the vengeance of the men, and ended in bloodshed. The moment How-How saw the outrage committed on his people, he wheeled about in disgust, and left the party. The whites had now to make a hasty retreat, before the neighbouring Indians had time to assemble; and got back to head quarters with speed, carrying along with them several scalps, which they exhibited on poles, as trophies of victory: they even danced with those trophies in the

square of Fort George, after their return! Anticipating, no doubt, a similar result from the Cowlitz quarter, to that which followed the Wallamitte embassy the year before, Mr. Keith was horror-struck at the cruelties perpetrated on the natives.

Every strategem that experience could devise, or hope inspire, was now resorted to, in order to induce How-How, the Cowlitz chief, to pay a visit to Fort George; in order that a secure footing might once more be obtained in the Cowlitz quarter. The Chinooks, to be sure, were in his way—they were his enemies; but what of that? The whites were his friend. He was promised ample protection, and a safe return cordially pledged. But he would listen to nothing: How-How was immovable.

At last, however, it was discovered that How-How had a daughter, both lovely and fair; the flower of her tribe! Princess How-How was admired. Her ochre cheeks were delicate, her features incomparable, and her dress surpassed in lustre her person: her robes were the first in the land; her feathers, her bells, her rattles, were unique; while the tint of her skin, her nose-bob, girdle, and gait, were irresistible! A husband of high rank had to be provided for the Princess How-How, and Prince How-How himself was formally acquainted with the wishes and anticipations of the whites. This appeal the sagacious and calculation chief could not resist. How-How therefore, with his fascinating daughter and train of followers, arrived in their robes of state at head quarters. The bridal-dress was beyond

compare! Prince How-How now became the father-in-law of a white chief, and a fur-trader became the happy son-in-law of Prince How-How.

We need scarcely mention here that the happy couple were joined together in holy matrimony on the first of April! After the marriage-ceremony, a peace was negotiated with How-How—this was the main point; and the chief prepared for his homeward journey, in order to pave the way for our trappers and hunters to return again to the Cowlitz.

But just as he and his followers were starting, a sad blunder was committed by the whites. It would appear that measures for their safety had either been overlooked or neglected; and after all the courtesy that had been shown the great man, he left the fort unguarded; he had not advanced three hundred yards from the gate, before he and his people were partially intercepted by some skulking Chinooks, who waylaid and fired upon them. How-How, instead of retreating back to the fort for protection, boldly called out to his men to face their enemies, and stand their ground. But the Chinooks being concealed, How-How's men could see nobody to fire at; so they immediately posted themselves behind trees. In the skirmish, a ball happened to strike the fort; and whether a shot is fired accidentally or by design, the event is equally alarming. The moment, therefore, the ball struck, the sentinel gave the alarm, by calling out, "The fort is attacked! How-How and his men are in ambush!" In the confusion of the moment, and only

How-How's party being seen, the first impression, although exceedingly improbable, was, that How-How himself had proved treacherous, and, on his departure, had fired upon the fort. Orders were, therefore, immediately issued to fire the bastion guns, by which one of How-How's men was severely, and another slightly, wounded. At the same time, all the people, who had been at work outside the fort, came rushing in; and, meeting parties in the square running to and fro in every direction, collecting arms and ammunition, much confusion ensued.

How-How and his party now stood between two fires; and, apprehending treachery on the part of the whites, were preparing to make a rush, and force their way through the Chinooks, to save themselves. But, by this time, the people who had entered the fort had time to set matters right, by giving information that the Chinooks had been lying in ambush, and first fired upon How-How; and that How-How was only defending himself. In the bustle and uproar of the moment, however, some time elapsed before men taken by surprise could reflect, or understand each other. The moment the shots were fired from the bastion, the Chinooks fled; thinking, as a matter of course, that they only had been fired at. As soon, therefore, as the whites ceased firing, all was over; and the whole was only the work of a few minutes. How-How was now brought into the fort, and the misunderstanding fully explained to him. But he was a changed man. On his part, the habits of familiarity and friendship

ceased; he was stern and sulky: Notwithstanding the praises that were bestowed on him, yet his pride was wounded, and he remained sullen and thoughtful. When he ultimately took his departure, after receiving many presents and more promises, his fidelity was evidently shaken, and his future support problematical.

The only field that now remained open for our trappers and hunters, as the Cowlitz could not be depended upon, was the Wallamitte; and to that quarter the thoughts of all were directed. Notwithstanding a sufficient number of trappers and hunters were occupied there already, yet all those who had been driven from the northern quarter now bent their course to the southern, to join those already there. From the general conduct of the Iroquois among the natives, it would have been better policy to have sent them all out of the country; distracting, as they did, the natives, destroying the trade, and disgracing the whites.[3]

Cowlitz villages evidently reached sizes of 100 persons:

'May 13th.—Two days ago I lift the fort and am now encamped on a plain below Warrior's point. Near me are several large lodges of Kowalitsk Indians;[118] in all probably one hundred persons. As usual, they give me some trouble by coming around

[3] Ross, Alexander, 1855, Vol. I, pp. 190-196.

[118] For the habitat of this tribe, see Franchere's Narrative, in our volume VI, p. 245, note 49—Ed.

and lolling about my tent, and importuning me for the various little articles that they see.'[4]

However, in the great epidemics of 1829-1832 at least three-fourths and perhaps more of the Cowlitz seemed to have been destroyed. For example, Sir George Simpson, governor of Hudson's Bay Company, on his trip of inspection in the middle 1830's comments:

'When I descended the Cowlitz in 1828, there was a large population along its banks; but since then the entermittent fever, which commenced its ravages in the following year, had left but few to mourn for those that fell. During the whole of our day's course, till we came upon a small camp in the evening, the shores were silent and solitary, the deserted villages forming melancholy monuments of the generation that had passed away.'[5]

That the Cowlitz were not destroyed as a tribe by these epidemics is, however, noted by Sir George Simpson:

(Area of Cowlitz farm)

'Of the aborigines there are but three small tribes in the neighborhood, the Cowlitz, the Cheeaylis and the Squally, now all quiet, inoffensive and industrious people; and, as a proof of this their character, they do very well as agricultural servants, thereby forming an important element in esti-

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[4] Thwaites, 1905, Vol. XXI, p. 342.

[5] Simpson, George, 1847, p. 107.

mating the advantages of the district for settlement and cultivation.'[6]

The last description of the Cowlitz before they passed into American hands is given by Kane, a wandering artist:

March 30th (1847)—We landed at the Cowlitz farm, which belongs to the Hudson's Bay Company. Large quantities of wheat are raised at this place. I had a fine view of Mount St. Helen's throwing up a long column of dark smoke into the clear blue sky. Here I remained until the 5th of April, and took the likeness of Kiscox, the chief of the Cowlitz Indians, a small tribe of about 200. They flatten their heads and speak a language very similar to the Chinooks. They were very friendly to me and I was a good deal amongst them. Sketch No. 10 is Caw-wacham, a woman of the tribe, with her child under the process of having its head flattened. It was with some difficulty that I persuaded her to sit, as she seemed apprehensive that it would be injurious to her. On the 5th of April I procured horses to cross to Nasquata at Puget's Sound, and rain poured down in torrents the whole day, making the swamps nearly impassable. We encamped in the evening near a small village of Cowlitz Indians, whom we found unusually kind and civil.'[7]

Ethnological, Archaeological, Linguistic Data

The ethnological evidence may be divided into three areas:

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[6] Simpson, George, 1847, p. 108-9.
[7] Kane, 1859, pp. 205-6.

1. Accounts of ethnologists who interviewed Indians who remembered the old-life way. The major authorities in this category are two in number; Dr. George Gibbs, who was in the area in the period 1853-1855 and Edward S. Curtis, who worked with surviving Cowlitz at the beginning of this century (Although Curtis came long after Gibbs he was able to interview Cowlitz and Taidnapam who had been born and reared in pre-treaty times.)

2. The published work and notes of modern ethnologists including Leslie Spier's "Tribal Distribution in the State of Washington" and Melville Jacob's "Historical Perspective in Indian Languages in Oregon and Washington" and the brief mention of the Cowlitz contained in Hodge's and Swanton's handbooks of America Indians.

3. The field notes of the present writer.

Gibbs mentions the Cowlitz briefly as to location and linguistic-affiliation:

> The banks of the Columbia from the Grand Dalles to its mouth belong to the two branches of the Tsinuk nation, which meet in the neighborhood of the Kowlitz River, and of which an almost norminal remnant is left; upon the elevated plateau lying south of Mt. Adams and Mt. St. Helens, and upon the southern and western slopes of the latter, are the Klikatat and the Tai-tin-apam; on the Kowlitz, the tribe of that name, once numerous, but now almost extinct; and in the mountains north of the Lower Columbia, between Shoalwater Bay and the heads of the Tsihalis, the tribe of Willopahm,

(Owhillapsh,) or, as termed by Mr. Hale, Kwalhioqua, now reduced to a handful. These alone belong to four of the five families or languages above mentioned: the Tsinuk together forming one; Klikatat and Taitinapam belonging to the Sahaptin, of which the Walla-Walla and Nez Perce are the leading types; the Kowlitz to the western branch of the Selish or Flatheads, and the Willopah to the same division with the Tahkali or Cariers, living on the headwaters of Frazer River, and the Klatskanai, Umkwa, and Tu-tuten of Oregon.[8]

The Cowlitz, likewise a once numerous and powerful tribe, are now insignificant and fast disappearing. The few bands remaining are intermingled with those of the Upper Chihalis. According to the best estimates obtained, the two united are not over one hundred and sixty-five in number, and are scattered in seven parties between the mouth of the Cowlitz and the Satsop.

The Taitinapam, a band of Klikatats already mentioned, living near the head of the Cowlitz, are probably about seventy-five in number. They are called by their eastern brethren wild or wood Indians. Until very lately they have not ventured into the settlements, and have even avoided all intercourse with their own race. The river Indians attach to them all kinds of superstitious ideas, including that of stealing and eating children, and of travelling unseen.[9]

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[8] Gibbs, 1877, pp. 164-165.

[9] Gibbs, 1855, p. 428.

Curtis gives a much more complete description of the tribe:

The Cowlitz comprises about thirty settlements distributed along Cowlitz river from its junction with the Columbia to a (For names and locations of Cowlitz villages see the Appendix.) point a few miles east of the Willamette meridian, a distance of forty to fifty miles. Allied by speech and proximity, the people of these villages were not politically united by a tribal organization. Nevertheless, their language contained a collective name for them —Stlpulimuxd.

No early writer gives us an adequate estimate of the Cowlitz population before strange diseases began their ravages. Native information must therefore be relied on. From one of the few survivors was obtained, along with a full list of the village and their location, a careful estimate of the number of houses in each settlement. The result is surprising, indicating a total of four hundred and forty-five houses, or a minimum population of more than six thousand.[10]

An outline of the seasonal occupations of the people affords a good conception of the manner in which they are subsisted. About the first of May they abandoned their permanent winter villages and erected in the prairies at the root-digging grounds mat lodges of the same type as their cedar-board houses. Two months later, having harvested and

[10] Curtis, 1913, I, p. 5.

cooked or dried their roots, they moved up into the hills where berries grew abundantly. Late in August close watch on the height of the water in the river was kept by young men despatched from time to time on this errand, and when, usually about the first of September, it was sufficiently low to permit the construction of weirs, the chiefs issued commands to their people, who set out for their respective villages. Here the women cleaned and renovated the houses, the families moved in, and soon all were busily engaged in building the fish-weirs, of which some of the larger villages controlled two while the majority were served by one each. Weir fishing continued until the freshets caused by early winter rains forced the removal of the timbers and poles, which were carefully laid away for the next seasons use. Throughout the winter and the early spring the salmon were taken by spearing in the smaller streams. The fish were preserved by hanging them on poles in the house and building a number of small fires beneath them. Like all tribes living on streams near the mountains, the Cowlitz were good hunters and followed the deer at all seasons.[11]

Curtis also gives a detailed account of the subsistence pattern of the Lower Cowlitz Indians:

Venison was the principal flesh food. Generally the tribes living close to the shoreline were indifferent hunters, the ease with which sustenance could be drawn from the sea and the rivers being sufficient to prevent them from engaging extensively

[11] Curtis, 1913, p. 6.

in the more arduous pursuit of land game. But in almost every group there were a few small bands inhabiting areas about the headwaters of the streams and depending largely on the chase; while a few of these Salish tribes lived altogether in the vicinity of the foothills and became excellent hunters. Such were the Cowlitz, the Upper Chehalis, and the Nooksack.

Deer were hunted in a variety of ways. A favorite method was the game drive. Deer lie hidden by day and feeding by night, browsing preferably on open hills near the brushy retreat of some deep gully. When a feeding ground had been discovered, a party of hunters, ten or perhaps thirty strong, would form at daylight a scattering line in the thicket at the base of the long, open slope, thus cutting off the usual retreat. At each end of the line a few men made a detour for the purpose of turning the animals back toward the hunters. Then the main party crept forward up the slope. Not only were the more distant deer driven back by the two parties of beaters, but any that were started up by the main body would usually dash along the line and attempt to escape into the gully, thus passing between two hunters, at least one of whom had a chance to hurl his spear. This missile had a detachable point, so that the same shaft could be used to implant many points. Occasionally the detachable head was attached by very strong sinew cords to the shaft, which, becoming entangled in the undergrowth, so impeded the animal that another huntsman had time to hurl his spear, or the first could

release an arrow. Occasionally a well-aimed arrow would bring a deer down in his tracks, but it was customary to direct the arrow toward the intestines of the creature, which then, if not too closely followed, would quickly sicken and lie down, an easy prey to surprise and a final missile. Hunting arrows very generally were fitted with detachable heads. In this there was a double purpose: to cause the blood to flow more profusely, and thus both weaken the animal and furnish a well-marked trail. At times arrows were tipped with heavy, blunt stones, and were dispatched, it is said, with sufficient force to stun a deer struck on the forehead.

Snares were set in the runways. One form consisted of a twelve-foot fir sapling bent over and secured by a cord, and, attached to the end of the sapling, a strong sinew rope with a large noose suspended across the runway at the height of a deer's head. A jerk of the noose released a trigger, and the rope tightened about the deer's neck, the resilience of the fir preventing the application of a pull sufficient to break the rope. The same kind of snare was set for a bear, with the substitution of heavy cedar withes for the sinew line. Even these the captive animal would sometimes gnaw asunder, but after guns became common the rope was passed through an old gun-barrel, which, when the trigger was sprung, quickly slid down the line and prevented the bear from touching the rope with his teeth.

A common and effective snare was a large-meshed sinew net stretched between resilient fir saplings

across a deer runway. At each end a hunter or two lay in wait, while others drove the quarry into the snare. In this way not only deer but elk, and even bear, were captured.

Pitfalls about six feet long, five feet deep, and three feet wide at the top, narrowing toward the bottom, were dug in the deer trails. Extreme care was exercised not to disturb the ground beyond the edges, and the excavated earth was carried off a considerable distance and scattered. Brush and moss were laid over the pit, great pains being taken to make the surface look in no wise different from the surrounding ground. Then an effort was made to start a deer toward the trap with an eye more on his pursuers than on the ground. Once wedged in the hole with its narrow bottom, a deer could not escape. Before digging a pitfall or setting a snare men always bathed ceremonially in order to remove the human taint and so avoid leaving the telltale scent on the trap.

The pitfall for elk was provided at the bottom with sharpened stakes on which the animal was impaled. Elk were easily driven at the season when they herded, and as they were directed through the mountain forests where undergrowth was thin, other hunters, concealed behind great trees, drove their spears into them as they passed. The wounded animals were left unmolested for a day and a night, and they were then found too weak to escape. In the deep snows of the higher mountains the floundering elk were surrounded by a band of hunters walking cautiously on the crust, and easily slaught-

ered. Among the Cowlitz, the Upper Chehalis, and the Twana, a single hunter would pursue the elk with the aid of two or three dogs, which were trained to follow their master until a fresh scent was found, when a word set them on the trail. When they overtook their quarry they snapped at his heels until he turned at bay, and there held him until their master came up. These elk dogs were of medium size. A different breed, used for chasing deer, usually caused their prey to take to water.

Wolves, bears, cougars, foxes, wildcats, and many small animals were not only shot with bow and arrow but trapped in the deadfall. Frequently this device, when set for the larger, fiercer animals, was equipped with sharpened, hardwood pegs, which firmly held the victim.[12]

The account which Curtis gives of the depletion of the Cowlitz by disease confirms the historical accounts left us by Sir George Simpson (See historical section), Dr. John McLaughlin and others:

The swift depletion of this tribe was due almost wholly to epidemic disease. It is known that between 1820 and 1830 congestive fever worked havoc among tribes of the lower Columbia. About 1830 measles attacked the Cowlitz with terrible effect, and about 1845 a visitation of cholera resulted in some two hundred deaths. Then quickly followed fever and chills, and the fever-wracked natives, throwing themselves into the streams for relief, hastened the

[12] Curtis, 1913, p. 52-54.

end. More than half the people died at this time, declares a woman who survived the attack. Many a house was left empty, or with a single occupant. Then in rapid succession came measles, cholera fever, and again the measles, and finally a few years later, an outbreak of smallpox completed the work and left the Cowlitz little more than a name. Whisky played but an insignificant role in the extinction of this tribe. It is safe to say that prior to about 1830 there were four thousand people on Cowlitz river, though it must be said that a few of the villages near its mouth were partly inhabited by Chinookan people married to Cowlitz.[13]

In 1912, Hodge published his Handbook of American Indians in which he briefly mentions the Cowlitz:

Cowlitz. A Salish tribe formerly on the river of the same name in S. W. Washington. Once numerous and powerful, they were said by Gibbs in 1853 to be insignificant, numbering with the Upper Chehalis, with whom they were mingled; not more than 165. About 1887 there were 127 on Puyallup res., Wash. They are no longer known by this name, being evidently classed as Chehalis.[14]

Dr. Spier in 1936 gave the following descriptions for Cowlitz and Taidnapam:

Cowlitz. The Cowlitz occupied the lower and middle course of the Cowlitz River. Curtis defines them as a collocation of politically separate units,

[13] Curtis, 1913, p. 5.
[14] Hodge, 1912, Vol. I, p. 355.

who nevertheless has a collective name for themselves, Stlpulimuhkl. They held the Cowlitz River from its mouth to about Kosmos, some forty or fifty miles. The Cowlitz villages which he lists extend from the mouth of the Coweman River (which joins the Cowlitz near its mouth) upstream to a point fourteen miles above Toledo.[10] In 1854 Gibbs wrote: "The few bands remaining are intermingled with those of the Upper Chihalis * * * and (with them) are scattered in seven parties between the mouth of the Cowlitz and the Satsop."[11]

Ta'iDnapam (Wanukt, Upper Cowlitz). I am following Jacobs in assigning the upper Cowlitz drainage alone to the Ta'iDnapam, although this is questionable in the light of earlier information. Gibbs writes that apart from the Klickitat are "reckoned the Tai-tin-a-pam, a band said to live apart in the country lying on the western side of the mountains, between the heads of the Cathlapoot'l (north fork of Lewis River) and Cowlitz."[8] This would bring the Ta'iDnapam somewhat farther south on the west side of Mount St. Helens. Curtis, who may however have been following Gibbs, places them only at the head of Lewis River. Teit, as we have seen, cites their occupation of both the Lewis and Cowlitz River Districts.

Some ten years ago Mr. Thomas Crum of Morton in the upper Cowlitz Valley told me of a small Sahaptin group near that place. They were called

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[10] Curtis, North American Indian, IX, 5, 173.

[11] Gibbs, in Stevens, Report of Explorations, 428.

[8] Gibbs, loc. cit.

Kaio'ni: a few families under their own chief. From the location one would suspect they were Ta'iDnapam.[15]

The writer might comment that Mr. Crum was right—there are still Taidnapam living in the vicinity of Morton at least fifteen of whom still speak their old language. Mr. Crum, however, was slightly confused—they do not call themselves the Kiona (This is the name of one of the principal families) but call themselves Upper Cowlitz and alternately, Taidnapam.

Dr. Swanton in 1952 gave a brief description of the Cowlitz and Taidnapam:

Cowlitz. Significance unknown. Also called: Nuso-lupsh, name given by Indians not on the Sound to Upper Cowlitz and Upper Chehalis.

Connections. The Cowlitz belonged to the coastal division of the Salishan linguistic family, yet shared some peculiarities with the inland tribes.

Location. Most of the lower and all the middle course of Cowlitz River. Later they were divided between Chehalis and Puyallup Reservations.

Towns

Ray (1932) gives: Awi'mani, at the mouth of Coweman River south of Kelso, and Manse'la, on site of Longview. (sic. je) (See Curtis, 1907-9)

Population.—Mooney (1928) estimated the number of the Cowlitz, along with the Chehalis, Humptulips, and some other tribes, at 1,000 in 1780. In 1853 Gibbs stated that they and the Upper Chehalis

[15] Spier, 1936, p. 26

counted not more than 165. About 1887 there were 127 on Puyallup Reservation. The census of 1910 returned 105. The United States Indian Office Report of 1923 gives 490, probably including other tribes.

Connections in which they have become noted.—The name Cowlitz is perpetuated by Cowlitz River and Cowlitz Pass; by Cowlitz Glacier, which radiates from Mount Rainier; and by Cowlitz County, Cowlitz Park, Cowlitz Chimney, Cowlitz Cleaver, and some small towns in the same region.[16]

Taidnapam. Also called Upper Cowlitz.

Connections.—The Taidnapam belonged to the Shahaptian division of the Shapwailutan linguistic family.

Location.—On the headwaters of Cowlitz River and perhaps extending over into the headwaters of the Lewis River.

Population.—Mooney estimates the population of the Taidnapam and the Klicktat together at 600 in 1780, but extinct as independent tribes by 1907.[17]

The Cowlitz were regarded as one of the more war-like tribes on the lower Northwest coast as the historical account from Franchere indicated and as both Curtis and Gibbs note:

> The Twana rarely, if ever, invaded the country of other tribes, but they were able to give a good account of themselves when, as not infrequently happened, warriors of the Snohomish or of the

[16] Swanton, 1952, pp. 422-423.

[17] Swanton, 1952, p. 446.

Chimakum put up the canal in their canoes, or when a party of Cowlitz came on foot against them. The character of their disorganized, savage warfare may be seen in the traditional account of two of their earliest knowr combats.[18]

'Dr. Tolmie informs me that the course of the slave trade has always been from south to north; the only exception in his knowledge being that the Kowlitz Indians, formerly a very strong tribe, used to make forays on the Sound and carry their prisoners to the Columbia River.'[19]

Finally, as to the boundary between Lower Cowlitz and Upper Cowlitz (Or Taidnapam), and the recency of Taidnapam intrusion, we have the comments on the linguistic evidence of Dr. Jacobs:

The recent drift of Kittitas-Sahaptin speech westward over passes of the Cascades into the Coast Salish, Upper Nisqually and Upper Cowlitz villages is revealing of recent gradual Sahaptin speech expansion westward to more attractive villages. Since it may be assumed that the economic-cultural life of the central parts of Washington changed very little for quite some period of time, it may be inferred that the modern tendency for Kittitas-Sahaptin to drift westward could have been paralled anciently by pre-Kittias languages. * * *[20]

The results of the map appended to the report of George Gibbs, prepared in 1856 which locates the

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[18] Curtis, 1913, p. 12.
[19] Gibbs, 1877, p. 189.
[20] Jacobs, 1937, PNQ Vol. 28, p. 72.

boundary between Taidnapam and Cowlitz in almost exactly the same place where the present writers ethnographical informants located it. In the autumn of 1955 the writer conducted a very brief archaeological survey along the upper reaches of the Cowlitz and observed that arrowheads and flint knives of an interior or plateau pattern—presumably ascribable to the Taidnapam—as far south as Mossy Rock and no further. The weight of the evidence then indicates that the Sahaptin speaking Taidnapam were late-comers into the region and that previously the Lower Cowlitz had occupied the Indian drainage area. At about treaty times, the Taidnapam achieved maxima penetration of the western slope just south of the present site of Mossy Rock, Washington.

Attachments

One Map of Indians of the Southern Northwest Coast.

Bibliography.

Acknowledgment of Service attached.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK THOMAS

State of Washington,
County of Lewis—ss.

Frank Thomas, being first duly sworn on oath, deposes and says:

That he is an American Indian and a member of the Cowlitz Tribe; that his father was Thomas Mercelle, whose Indian name was Tushwik; that affiant was born on the North Fork of the Newaukum River in Cowlitz tribal country, Lewis County, Washington, and has lived his entire life in this area.

That he and his family and his ancestors fished in the Cowlitz River, obtaining salmon particularly, said fishing being from time immemorial and since the coming of the white man and down to date. That before the coming of the white man the Indians obtained fish from said river for their own use, preserving the same by smoking and drying. That later many fish were sold, many Indians making their living by fishing. That in addition to the Indians living in the near vicinity of the Cowlitz River, many Cowlitz Indians came from distant parts of the tribal domain to fish in said river, some of the Indians being this affiant, his family and his ancestors. That the fishing in said river was along its entire length, from its source to its mouth and the fish taken were all species of salmon and all species of trout.

That much of the land of the Cowlitz Tribe lies

in the Cowlitz Valley above the two dams proposed to be built by the City of Tacoma, one at Mayfield and the other at Mossyrock and affiant is informed and believes that several thousand acres will be covered by said water and that said Cowlitz Indians claim said land by aboriginal title, said title never having been extinguished by treaty, purchase or otherwise, and still remains in said Indians.

That said Indians used the Cowlitz River as a thoroughfare upon which they plied their canoes and that the Cowlitz River will be destroyed as a waterway for said Indians by the erection of said dams, as said dams will be of great height.

That the said Cowlitz Indians did hunt and obtain elk, bear, deer and beaver on the lands soon to be inundated by the waters impounded by said proposed dams to be built by the City of Tacoma.

/s/ FRANK THOMAS

Subscribed and sworn to before me this 9th day of December, 1955.

[Seal] /s/ JAS. E. SAREAULT,
Notary Public in and for the State of Washington, residing at Chehalis.

[Endorsed]: Filed December 10, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN EYLE

State of Washington,
County of Lewis—ss.

John Eyle, being first duly sworn on oath, deposes and says:

That he is an American Indian and member of the Cowlitz Tribe; that he resides at Nesika, in Lewis County, Washington; that he is the owner under restricted title of the East one-half of the Northeast Quarter of the Southeast Quarter (E½ NE¼ SE¼ of Section two (2), Township eleven (11) North of Range four (4) East of the Willamette Meridian, Lewis County, Washington, and that he has resided on said land for approximately 63 years; and that his father Sam Eyle resided on said land for many years prior thereto. That said land is on the banks of the Cowlitz River, the river passing through a small portion thereof.

That affiant was born at Agate, in Lewis County, Washington, not far distant from his present home; that his entire life was spent in the vicinity, he living at Agate until he was approximately eight years of age, at which time the family moved to Nesika, the present home, where he has since lived.

That another Indian, Mary Kiona, owns land directly across the road north of and adjoining the property of affiant, said property being in the same section, township and range and also touched by the said Cowlitz River. That both the land of affiant

and of Mary Kiona will be inundated by the waters of the Cowlitz River impounded by the Mayfield Dam which is proposed to be built by the City of Tacoma, Washington.

That the Cowlitz Indians have fished in the Cowlitz River from time immemorial and do so now. That prior to the coming of the white man, their entire living was obtained from fish from the river and game animals from the woods. That the fish taken from the river were silvers, chinook, calico fish (dog salmon), chubs, smelt, trout of all varieties, including steelhead, and suckers. Fishing on the said river was from its mouth near Kelso, Washington to as far up the water shed as the salmon would run, which was above the present town of Packwood on the Cowlitz River and far up the Cispus River, a tributary of the Cowlitz River, and the Niggerhead, a tributary of the Cispus. Before the coming of the white man, fish taken were for the Indian's own use as food, and upon the coming of the white man, much was sold. The Indians to this day fish in said Cowlitz River for their own use.

All Cowlitz Indians living in the vicinity of the Cowlitz River fished in said river; among said Indians being the following families:

White, near Kelso, Washington;
Shokol, near Kelso, Washington;
Chebeltz, Castle Rock, Washington;
Captain Peter, Olequa;
Cotennoire, Olequa;
Iyall, above Olequa;

Stokum, near Toledo;
Kimpus, Cowlitz Prairie;
Kinswa, Castamas and Sheungun, near Mayfield;
Tal-u-ya, Mossyrock;
Tal-i-kish, Riffe;
Yoke and Eyles, Nesika and Kosmos;
Satanas and Kionas, Cowlitz Falls (Randle);

That said Indians and all others in the watershed of the Cowlitz River fished said river from time immemorial and such Indians as remain now fish in said river.

That affiant, his ancestors, and all other Indians in the watersheds of the Cowlitz River operated their canoes on said river and used the same as a thoroughfare, and many canoes were used as each Indian owned his own canoe.

That thousands of acres will be covered with water by the water impounded behind the dams proposed to be built by the City of Tacoma and said water will cover land used by said Indians from time immemorial, the aboriginal title in said land having never been extinguished by treaty, purchase or otherwise. That the flooding of said lands and the raising of said water level of said river will destroy the accustomed fishing places of affiant and other Indians of the Cowlitz Tribe and prevent him and them from the use of said river as a means of transportation, as one dam will be in excess of 300 feet in height and the building of said dams will destroy in a large degree the Cowlitz River as a salmon and fishing stream.

That the Indians buried their dead on ground

which will now be covered by the waters of said dams, one of said burial places which will be covered being at Nesika and another at Harmony, the one at Harmony being known as the Ike Cemetery. There are other burial places near Harmony, the exact location of which is unknown to affiant. However, it is believed that said burial places will likewise be covered by the waters behind said dam.

/s/ JOHN EYLE

Subscribed and sworn to before me this 9th day of December, 1955.

[Seal] /s/ JAS. E. SAREAULT,
Notary Public in and for the State of Washington, residing at Chehalis.

[Endorsed]: Filed December 10, 1955.

[Title of District Court and Cause.]

INTERROGATORIES BY THE DEFENDANT

Please Take Notice that the defendant herein, City of Tacoma, requires the Cowlitz Tribe of Indians, plaintiff herein, to answer the following interrogatories within fifteen days from the date of service hereof, pursuant to Rule 33 of the Federal Rules of Civil Procedure.

1. Has a copy of defendant's Exhibit 1, consisting of a key map and thirteen sheets and an

affidavit of explanation, been served upon the plaintiff or its attorneys of record?

2. Does the plaintiff know and is it familiar with the lands and rights in connection therewith embraced in the Cowlitz project and involved in this action?

3. Are all of the lands and the waters involved in the Cowlitz project and which are involved in this action correctly shown on the above mentioned map?

4. If all of such lands and waters are not shown on the map in question, what other such lands and waters are claimed by the plaintiff and involved herein, and what is the legal description and location of each of such additional lands and waters?

5. Are all of the fishing and hunting grounds and rights claimed by the plaintiff as being or threatened to be damaged or destroyed by the defendant and involved in this case, those located upon or connected with the lands and waters described and set forth on the said map above mentioned?

6. If all of such fishing and hunting rights so claimed by the plaintiff are not located upon or connected with the lands and waters described on said map, what other such additional fishing and hunting rights are claimed by the defendant and involved herein, and what is the legal description and location of the lands and waters upon or in which such additional hunting and fishing rights are claimed?

7. Are all water rights of every kind claimed by

the plaintiff as being or threatened to be destroyed or damaged by the defendant and involved in this action, those located upon or in connection with the lands and waters shown on the said map above mentioned?

8. If all of such water rights involved herein claimed by the plaintiff as being or threatened to be destroyed or damaged by the defendant are not located upon or connected with the lands and waters shown on said map, what other such water rights involved herein are claimed by the plaintiff, and what is the legal description of the lands and waters upon which such additional water rights are located and claimed?

9. Are all burial grounds or cemeteries and all rights in connection therewith claimed by the plaintiff as being or threatened to be destroyed or damaged by the defendant, those located upon or in connection with the lands shown on the said map above mentioned?

10. What are the names of or other identification of the burial grounds or cemeteries which the plaintiff claims will be or are being damaged or destroyed by the defendant?

11. Are all of these alleged burial grounds or cemeteries so named above located upon the lands shown on the said map above mentioned?

12. What is the legal description of the parcels of land upon which each of these alleged burial grounds or cemeteries is located?

13. What are the names of the present owners

of the parcels of land upon which each of the alleged burial grounds or cemeteries are located?

14. What are the names of or the identification of the burial grounds and cemeteries, if any, which are still used by the plaintiff?

15. Are all mineral rights of every kind involved herein and claimed as or threatened to be appropriated or destroyed by the defendant, located in or upon or in connection with the lands and waters shown on the said map above mentioned?

16. If there are any other such additional mineral rights of any kind not shown on said map and involved herein and claimed as being or threatened to be appropriated or destroyed by the defendant, give the legal description of the lands and waters in or upon which such additional claimed mineral rights are located.

17. Has a copy of the defendant's Answer, including Exhibit 1 (both the original and substitute copies ordered by the Court), Exhibit 2 and 3, annexed thereto, been heretofore served upon the plaintiff?

18. Are all of the lands and waters involved herein which were or are now owned by the State of Washington and which are shown on said map above mentioned, those lands which the State acquired from the United States under the provisions of the Organic Act, approved by Congress March 2, 1853, and the Enabling Act, approved by Congress February 22, 1889, and which acts are set forth in Volume 1, Rem. Rev. Stat. 315-345?

19. If your answer to Interrogatory No. 18 is

in the negative, when, from whom, and by what means were such lands and waters acquired by the State of Washington?

20. Are all of the lands and waters involved herein and shown on the map above mentioned as belonging to the United States, lands which were or still are public domain or subject to disposition by the United States.

21. If your answer to Interrogatory No. 20 is in the negative, who does own such lands and waters or parts thereof, and what is the exact interest of such owners in such lands and waters and from whom and by what means was such interest acquired?

22. Have all of the other lands and waters shown on said map (excepting the lands and waters shown thereon as owned by the State of Washington and the United States) and involved in the Cowlitz project and in this action, heretofore been, or purported to have been, conveyed or granted by the United States to third parties, as evidenced by the patents, patent applications and grants set forth in Exhibit 1 which is annexed to the defendant's Answer?

23. If your answer to Interrogatory No. 22 is in the negative, what lands and waters involved in this project and in this action are not covered by these instruments of conveyance or grants set forth in Exhibit 1 annexed to defendant's Answer, and what is the location and the legal description of such lands and waters and the names of the owners or purported owners thereof?

24. Was the plaintiff or its attorneys heretofore served with a copy of Exhibits 2 and 3 annexed to defendant's Answer?

25. Did the plaintiff file its claim before the Indian Claims Commission, as set forth in said Exhibit 1 annexed to defendant's Answer.

26. Does this claim cover and include all of the lands and waters and rights in connection therewith that are involved in the Cowlitz project and this action, and which the plaintiff claims are or will be appropriated, damaged or destroyed by the defendant?

27. If the answer to Interrogatory No. 26 is in the negative, what is the location, description and character of such additional other lands, waters and rights in connection therewith which are involved in the Cowlitz project and this action?

28. Was this said claim filed by the plaintiff before the Indian Claims Commission under the specific authority of the act of Congress passed August 13, 1946, 60 Stat. 1050 et seq.?

29. Was the following statement, contained in said petition and verified by the plaintiff (Exhibit 2 annexed to defendant's Answer), true, to-wit:

"* * * No further effort was made by the United States after said council meeting terminated March 2, 1855, to treat with said tribe, but the United States continued to encourage the settlement of the lands of said tribe by American settlers, made numerous grants of land to such settlers out of the lands of said tribe and forcibly removed the Cowlitz

Indians from their lands, all without compensation to said tribe and its members."

30. If the answer to Interrogatory No. 29 is in the negative, why and in what particulars is said statement not true?

31. Does this statement so made embrace all the lands, waters and rights claimed by the plaintiff and involved in this project and action?

32. Does the plaintiff claim fee simple title, a vested right, to the exclusion of all others, to all of the lands and waters and rights appurtenant thereto shown on the map mentioned in Interrogatory No. 1?

33. If the plaintiff does not claim fee simple title to all of said lands and waters, to the exclusion of all others, what is the legal description and location of the lands and waters claimed and the exclusive rights therein claimed by the plaintiff?

34. Does the plaintiff claim exclusive ownership of all water rights of every kind pertaining to or in connection with the lands and waters involved in this project and action and shown on said map?

35. If such exclusive ownership of all of such water rights is not claimed by the plaintiff, what interest therein does the plaintiff claim and what is the legal description of the lands and waters upon which such exclusive water rights are located or from which such water rights arise?

36. Does the plaintiff claim the exclusive and unrestricted right to hunt and fish on all of the lands and waters shown on the said map above mentioned and involved in this project and this action?

37. If such exclusive rights are not claimed, what rights are claimed by the plaintiff and what is the legal description of the property and waters upon which such hunting and fishing rights are claimed that are involved in this project and this action?

38. Does the plaintiff claim the exclusive ownership of all minerals and rights in connection therewith in all of the lands and waters shown on the said map above mentioned and involved in this project and action?

39. If such exclusive rights are not claimed by the plaintiff, what is the nature and extent of such rights so claimed and the legal description of the lands and waters in which such rights are claimed which are involved in this project and in this action?

40. Does the plaintiff claim the exclusive right to keep and maintain all burial grounds and cemeteries alleged by the plaintiff to exist on all of the lands shown on the map above mentioned and involved in this project and in this action?

41. Does the plaintiff claim this exclusive right to keep and maintain these burial grounds regardless of who presently owns the property upon which such burial grounds and cemeteries are located?

42. Does the plaintiff claim the exclusive right to establish and maintain new cemeteries or burial grounds on all of the lands shown on the map above mentioned, regardless of any present ownership?

43. Has the plaintiff at any time ever had any treaty with the United States involving or affect-

ing in any way the lands, waters and rights claimed and asserted by the plaintiff in this action and included in the Cowlitz project?

44. If the answer to said Interrogatory No. 43 is in the affirmative, does the plaintiff in any way base any of its claims asserted in this action on any such treaty that the plaintiff has or may have had with the United States?

45. If the answer to the above Interrogatory No. 44 is in the affirmative, upon what treaty or treaties are such claims based and where may such treaty or treaties be found and examined?

46. Has the plaintiff ever had any written agreement of any kind with either the State of Washington or the United States, or both, involving or affecting in any way any of the rights and claims asserted in this action by the plaintiff?

47. If the answer to the above Interrogatory No. 45 is in the affirmative, does the plaintiff base any of its rights or claims asserted herein on such agreement, and if so what are the provisions upon which plaintiff bases its claims and where may such agreement be found and examined?

48. Has the plaintiff acquired any lands, waters or rights asserted herein, by any deed, grant or other instrument of conveyance from the United States or from the State of Washington or from any other person?

49. If the answer to any part of the above Interrogatory No. 48 is in the affirmative, what is the legal description of the lands and waters, together

with the rights acquired therein, and where are such instruments of conveyance recorded?

50. Does the plaintiff in any way base any of its rights and claims asserted herein on any Federal or State law?

51. If the answer to the above Interrogatory No. 50 is in the affirmative, what is the citation of such statute or law, and the provisions thereof upon which such claims are based?

52. Does the plaintiff base any of its claims and rights asserted herein on "adverse possession"?

53. If the answer to the above Interrogatory No. 52 is in the affirmative, what claims and rights are so based on "adverse possession" and what is the legal description of the lands and waters with rights pertaining thereto so claimed?

54. Does not the plaintiff base all of its alleged rights and claims asserted in this action solely on its alleged "Indian" or "aboriginal" title?

55. If the answer to the above Interrogatory No. 54 is in the negative, on what additional basis are such rights and claims asserted?

56. Does the plaintiff claim that the United States, by any law or rule of court, has authorized the bringing of this and similar suits in the district courts of the United States and conferred jurisdiction on such courts to hear the same?

57. If the answer to the above Interrogatory No. 56 is in the affirmative, what is the citation of such laws or rules of court claimed by the plaintiff as

vesting jurisdiction of this cause of action in this district court of the United States?

Dated this 17th day of January, 1956.

/s/ CLARENCE M. BOYLE,
City Attorney
/s/ MARSHALL McCORMICK,
Chief Ass't City Attorney
/s/ W. L. BROWN, JR.,
Ass't City Attorney,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 25, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS AND OF THE GENUINENESS OF DOCUMENTS

The defendant City of Tacoma, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requests the plaintiff Cowlitz Tribe of Indians, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

I. That each of the following documents, typewritten or photostatic copies of which are annexed to defendant's Answer and heretofore served upon the plaintiff and filed herein, is genuine:

A. In respect to Exhibit 1 annexed to defendant's Answer:

(1) The 77 patents and three patent applications granted by the U. S. under the Homestead Act, 12 Stat. 392, passed by Congress May 20, 1862.

(2) The 23 patents granted by the U. S. under the Public Land Act, 3 Stat. 566, passed by Congress April 26, 1820.

(3) The six patents granted by the U. S. under the Railroad Acts, 13 Stat. 365, passed by Congress July 2, 1864, and 16 Stat. 378 (Joint Resolution) passed by Congress May 31, 1870.

(4) The two patents granted by the U. S. under 30 Stat. 597, passed by Congress July 1, 1898 (Railroad Act).

(5) The two patents granted by the U. S. under 30 Stat. 597, passed by Congress July 1, 1898, and 34 Stat. 197, passed by Congress May 17, 1906 (Railroad Acts).

(6) The three patents granted by the U. S. under the acts pertaining to homesteads by Indians, Rev. Stat. Ch. 5, Title 32, 23 Stat. 96, passed by Congress July 4, 1884.

(7) The three patents granted by the U. S. in relation to Indian homestead rights, 24 Stat. 388, passed by Congress February 8, 1887.

B. The petition and claim of the plaintiff filed before the Indian Claims Commission of the United States, annexed to defendant's answer as Exhibit 2.

C. The Answer of the United States to plaintiff's claim and petition above mentioned in Paragraph B, annexed to defendant's answer as Exhibit 3.

II. That the map marked for identification as defendant's Exhibit 1, consisting of a key map and 13 sheets and an affidavit of explanation thereof, copies of which have heretofore been served upon the plaintiff and filed in the above action, is a genuine map of the land and area involved in this action, with the exception of transmission lines from the project.

Dated this 17th day of January, 1956.

/s/ MARSHALL McCORMICK,
One of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 25, 1956.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES OF DEFENDANT

Comes now the plaintiff and for answer to the Interrogatories of defendant replies as follows:

1. Yes.
2. More or less, yes.
3. We presume they are.
4. Roughly, Cowlitz Tribal lands are bounded on the easterly side by a straight line down between the peaks of Mt. Adams and Mt. Rainier and extended to the south to the Columbia River and from thence along the middle of the Columbia River to a point opposite Stella, Washington, from

thence on a line extended northerly on a line drawn from Stella on the Columbia River to Curtis, Washington on the Chehalis River and from thence on a line drawn easterly through the point of beginning to the peak of Mt. Rainer including the entire Cowlitz and Lewis River watersheds.

5. No.

6. Same as answer to No. 4 above.

7. Part of water rights are involved, others are not as indicated in answer to No. 4 above. The answer is No.

8. Any other rights owned by plaintiffs within the area described in No. 4 above.

9. No.

10. The lists of individuals in buried areas are not completed at this time.

11. Not necessarily; some of the Cowlitz burial grounds are not on lands being taken by defendant.

12. This information is not available at this time. (Compilation is started).

13. This information is not available at this time. (Compilation is started).

14. This information is not available at this time. (Compilation is started).

15. Plaintiff hasn't had an opportunity to compare the map with known deposits of mineral rights in the area described in No. 4 above.

16. Same as answer to No. 15.

17. Yes.

18. No, some State lands acquired otherwise Plaintiff hasn't had an opportunity to compare de-

fendant's map with the records at Olympia and Chehalis.

19. Don't know; have no such information.

20. Don't know, since this is a question of law and of facts in issue. But presumably they are. (See answer to No. 4).

21. Same as answer to No. 20 above.

22. Some have; others haven't, but all patents may have different exceptions, i.e., Railroad patents preserve Indian rights.

23. Plaintiff hasn't had opportunity to examine all of the patents and compare them with defendants map of its project. (See Answer to No. 4 above).

24. Yes.

25. Yes.

26. No, since plaintiff's rights to its Tribal Lands have never been extinguished, the plaintiffs own all property and all rights of property in fee and en grosse of every nature whatsoever in the area described in the answer to No. 4.

27. Land area is described in the answer to No. 4 above; other rights are hunting, fishing, gathering, burial, berrying, timber, mineral, water rights, navigation, riparian, and all other rights incidental or appurtenant to the above described lands in No. 4.

28. Yes, under the Indian Claims Commission Act of 1946.

29. Yes; 30, (see answer to No. 29); 31, No; 32, Yes; 33, (see answer to No. 32); 34, yes; 35, (see

answer to 34); 36, yes; 37, (see answer to 36); 38, yes; 39, (see answer to No. 38); 40, yes; 41, yes, 42, yes.

43. No, but plaintiff is ready to negotiate or make a Treaty as provided in the Act of Congress on Treaties for 1850.

44. No, but on the fact Congress authorized and ordered a Treaty negotiated under the Act of 1850.

45. (See answer to No. 44).

46. No; 47, see answer to No. 46; 48, No.

49. See answer to No. 48.

50. Yes, on Ordinance of 1787; on Washington State Constitution; on Treaty Act of 1850; and on Washington State Enabling Act of 1889.

51. Defendant is referred to the briefs of plaintiff herein.

52. No.

53. Claim is based on fact and law as per brief of plaintiff and principally that plaintiff's title has never been extinguished in any manner whatsoever, and particularly not in the manner provided by Congress in the Treaty of 1850.

54. Yes, and on the fact of "recognized title" in that its title was never extinguished as provided by the Treaty Act of 1850.

55. See brief and authorities set out by plaintiff herein.

56. Yes.

57. See brief and authorities by plaintiff herein.

Dated this 8th day of February, 1956.

/s/ JACQUELINE HILL

Duly verified.

Acknowledgment of Service attached.

[Endorsed]: Filed February 10, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF MALCOLM S. McLEOD ON MOTION TO DISMISS

State of Washington,
County of King—ss.

Malcolm S. McLeod, first being duly sworn, upon oath, deposes and says:

That he is one of the attorneys for the plaintiff herein, that he makes this affidavit for and on behalf of the plaintiff.

That certain facts are set out herein for the information of the Court in interpreting the importance of cession of Indian Lands by Treaty according to the dictates of Congress:

For the nine Tribes directly north of plaintiff's Tribal lands the following facts are significant in considering the case at Bar:

Pursuant to the Act of July 31, 1854, and the instructions of the Commission of Indian Affairs, Governor Stevens negotiated the treaty of December 26, 1854 (10 Stat. 1132) between the United

States and nine named tribes and bands of Indians

> "occupying the lands lying round the head of Puget's Sound and the adjacent inlets who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, * * *"

The treaty commonly referred to as Medicine Creek (She-Nah-Nam) Creek, 10 Stat. 1132 was not ratified by the Senate until March 3, 1855, and was proclaimed April 10, 1855. By its terms the said tribes and bands ceded, relinquished, and conveyed all their "right, title and interest" in and to a described area of land in Northwest Washington Territory "occupied by them", reserving for themselves three small reservations.

The area which includes the claimed area, is shown as tract 345 and the reserved areas as Tracts No. 405, 406, and 346 on Royce's Maps 1 of the State of Washington.

The United States Congress decreed that Treaties be made and the following excerpt from the Secretary of Interior is quoted to illustrate the manner in which extinguishment by Treaty took place:

In the Annual Report of Secretary of the Interior for the year 1856, he reports the fact that the United States extinguished the Indian title to 2,-236,160 acres under the Treaty of Medicine or (She-Nah-Nam) Creek as follows: (Page 264 to 267)

"A statement designating the Indian Tribes with whom treaties have been negotiated since March 4,

1853; the nature thereof, whether peace or friendship, the extinguishment of Original Indian Title, or the reacquisition of lands formerly granted to Indian Tribes, and showing as nearly as can be ascertained the quantity of lands to which title has been extinguished or reacquired, the quantity reserved by the tribe, and the consideration agreed to be paid (for extinguishment of title) in each case:

Name of Tribe: Nisqually, Puyallup, Steilacoom, Squaksin, S'homamish, Stahcop, T'Peeksin, Squaitl and Sahhihwish Indians; located Washington territory; date of Treaty, Dec. 26, 1854; number of acres to which Indian title has been extinguished, 2,236,160.

Number of acres reserved by tribe: 3,840; consideration, $35,750.

Secretary of Interior, Office of Indian Affairs, October 16, 1856.

That these lands are directly north of the ancient tribal lands of the Cowlitz Tribe of Indians and it was and is the intent of Congress to extinguish the Indian Title by Treaty and not by some vague implication, as contended by defendant.

Treaty Negotiations With the Cowlitz

The intention of the United States to extinguish the Indian Title of plaintiffs to their lands is clearly set out in the record of the Treaty Proceedings at Cosmopolis, in February and March 1855, by Isaac Stevens, Governor of Wn Territory and Superintendent of Indian Affairs for Wash-

ington Territory: (taken from Archives, State Library, Olympia, Washington):

"Mr. Shaw arrived on Monday with the delegation of Cowlitz and Chinook Indians. The time had meanwhile been occupied by Col Simmons and the interpreters present in explaining the details of the Treaty proposed to be made, to the several chiefs that it might be told in advance to their people.

Tuesday, February 27th—The Council (Treaty Making) was opened, and Col. Simmons announced its object. The Indians were then addressed by Gov. Stevens as follows: (page 21 serial 355 of Treaty Proceedings)

"My children, I have seen many Indians in the last two months. None better clothed nor apparently better clothed than you. You have seen the whites for years. You have heard of the great Father, yours, and the father of the whites. That great father has many white children and they are coming here: the great Father wishes that his white and red children should be friends, and you are friends now, what is your state now though? Do you own all your old burying grounds and potatoe patches, have you not been told by the whites 'Let us have these places, and the Great Father will pay you for them?' The Whites now have these lands, but you have not got your pay, and the great father has sent me here to talk with you and know that he should pay you for them, and he also thinks you should have homes where no white man would go without your wish. You want homes where you can

live happy all your days and gather roots, berries and fish, and you shall have them. You have many children. We want those children and you to have trades and to farm, etc. Some times you are sick and need a physician, you also want ploughs and tools to raise crops, and you want also an elder brother, as agent who shall be your brother and take care of you. This is the heart of your great Father, it is my heart, that of your older brothers, Mr. Simmons, Mr. Tappan, and Mr. Shaw (interpreters and aides to Stevens).

(At page 22 Serial 355) "We want you to quit whiskey and you will become (strong) again, and the bad white men as you know are the ones who beat and ill treat you. We want you to take fish where you have always done so and in common with the whites. We want your animals to feed on the prairies. * * * We want you (Cowlitz) to continue to run your canoes in the rivers and be paid for it."

The language of Governor Stevens leaves no doubt as to the fact that the Indian Title had not been extinguished, and further that the Indians owned the land, fishing, berrying, burial, agricultural, water, navigation, and other rights of property.

Your affiant hereby certifies that the foregoing quotations are true and correct copies of the original transcripts of said reports. Further affiant sayeth naught.

/s/ MALCOLM S. McLEOD

Subscribed to and sworn to before me this 13th day of February 1956.

[Seal] /s/ WING C. LUKE,
Notary Public for the State of Washington, residing at Seattle.

[Endorsed]: Filed February 15, 1956.

In the United States District Court for the Western District of Washington, Southern Division

Civil Action No. 1934

THE COWLITZ TRIBE OF INDIANS,
Plaintiff,

vs.

THE CITY OF TACOMA, a municipal corporation,
Defendant.

ORDER DISMISSING ACTION FOR WANT OF JURISDICTION

This cause came on regularly for hearing March 22, 1956, upon a preliminary hearing to determine the affirmative defenses set forth in defendant's Answer pursuant to Rule 12(d) of the Federal Rules of Procedure, the defendant appearing by Malcolm S. McLeod and Fredrick Paul, of counsel for the plaintiff, and the defendant appearing by Marshall McCormick and W. L. Brown, Jr., of counsel for the defendant, and affidavits, exhibits and briefs on behalf of both parties having there-

tofore been filed in said cause, and arguments of counsel for both parties having been made, and additional briefs having thereafter been filed herein in accordance with the permission of the Court, and the Court having examined and considered the evidence and the records and files herein, and being advised in the premises, it is now therefore,

Ordered that the above entitled action be and is hereby dismissed for want of jurisdiction of the subject matter.

Dated this 17 day of April, 1956.

/s/ GEO. H. BOLDT,
Judge

Presented by:

/s/ MARSHALL McCORMICK,
of Counsel for Defendant

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above named Defendant, and its Attorneys:

Notice is hereby given that plaintiff, The Cowlitz Tribe of Indians, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that Order of Judgment of Dismissal done in open court on the 17th day of April, 1956:

"Ordered, that the above entitled action be and

is hereby dismissed for want of jurisdiction of the subject matter".

Dated May 10, 1956.

/s/ MALCOLM S. McLEOD,
Attorney for Plaintiffs

Acknowledgment of Service attached.

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we Cowlitz Tribe of Indians the Plaintiff above named, as principal, and the Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto City of Tacoma, a municipal corporation, the Defendant above named in the just and full sum of Two Hundred Fifty Dollars, ($250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of May, 1956.

The Condition of this obligation is such, that whereas, the above named City of Tacoma, a municipal corporation on the 17th day of April, 1956, in

the above entitled action and court, recovered judgment against the Cowlitz Tribe of Indians above named for Order of Judgment of Dismissal.

And Whereas, the above named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said Superior Court to the United States Court of Appeals.

Now Therefore, if the said principal Cowlitz Tribe of Indians shall pay to City of Tacoma, a municipal corporation the Defendant above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, then this obligation to be void; otherwise to remain in full force and effect.

/s/ COWLITZ TRIBE OF INDIANS,
/s/ By MALCOLM McLEOD,
Attorney-in-Fact

[Seal] MARYLAND CASUALTY COMPANY,
/s/ By A. M. NIKISCHER,
Attorney-in-Fact

Countersigned by:

HANSEN & ROWLAND, INC.
/s/ By R. D. CALLENDER,
Vice President

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of Amerieа,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers and pleadings in the above entitled cause as are designated by the written Designations of the parties hereto, and the said papers and pleadings herewith transmitted constitute the Record on Appeal from that certain Order Dismissing Action for Want of Jurisdiction, filed and entered on April 17, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (with Jury Demand), (filed July 20, 1955).

2. Answer (with Exhibits 1, 2 and 3 attached), (filed Oct. 6, 1955).

3. Motion and Application for a Preliminary Hearing, (filed Oct. 6, 1955) (Referred to in Plaintiff's Supplementary Designation of Record on Appeal as "Motion to Dismiss").

4. Defendant's Citation of Authorities and Brief

in Support of Motion for a Preliminary Hearing (filed Oct. 6, 1955).

5. Defendant's Affidavit and Statement of Reasons on Motion for Preliminary Hearing (filed Oct. 6, 1955).

6. Amendment to Answer by Adding Prayer (filed Oct. 19, 1955).

7. Affidavit of Isaac Ike Kinswa (filed Dec. 8, 1955).

8. Affidavit of Sarah Castama (filed Dec. 8, 1955).

9. Affidavit of Malcolm S. McLeod (with Exhibits A and B attached) (filed Dec. 8, 1955).

10. Affidavit of Dr. Herbert C. Taylor (filed Dec. 9, 1955).

11. Affidavit of Frank Thomas (filed Dec. 10, 1955).

12. Affidavit of John Eyle (filed Dec. 10, 1955).

13. Interrogatories by the Defendant (filed Jan. 25, 1956).

14. Request for Admission of Facts and the Genuineness of Documents (filed Jan. 25, 1956).

15. Answers to Interrogatories of Defendant (filed Feb. 10, 1956).

16. Affidavit of Malcolm S. McLeod on Motion to Dismiss (filed Feb. 15, 1956).

17. Order Dismissing Action for Want of Jurisdiction (filed and entered April 17, 1956).

18. Notice (Plaintiff) of Appeal (filed May 14, 1956).

19. Bond for Costs on Appeal (filed May 14, 1956).

20. Designation (Plaintiff) of Record on Appeal (filed June 8, 1956).

21. Supplementary Designation (Plaintiff) of Record on Appeal (filed June 12, 1956).

22. Motion to Extend Time to Docketing Appeal (filed June 15, 1956).

23. Order Extending Time to Docket and File Record on Appeal (filed June 15, 1956).

24. Designation (Defendant) of Record on Appeal (filed June 21, 1956). (Clerk's Note: Maps and exhibit referred to in Item 7 of Defendant's Designation is being forwarded to Circuit Court separate from the Certified Transcript of the Record on Appeal, being tendered for use and convenience of the Court if so desired.)

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred by my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to-wit: Notice of Appeal, Plaintiff $5.00, and that the said fee of $5.00 has been paid to the Clerk by the Plaintiffs.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Tacoma, Washington, this 25th day of July, 1956.

[Seal] MILLARD P. THOMAS,
Clerk

/s/ By E. E. REDMAYNE,
Deputy

[Endorsed]: No. 15211. United States Court of Appeals for the Ninth Circuit. The Cowlitz Tribe of Indians, Appellant, vs. City of Tacoma, a municipal corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: July 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15211

COWLITZ TRIBE OF INDIANS,
Appellants,

vs.

CITY OF TACOMA, a municipal corporation,
Appellee.

STATEMENT OF POINTS ON APPEAL

Come now the Appellants, the Cowlitz Tribe of Indians, and for their statement of Points on Appeal, allege the court erred as follows:

1. In denying jurisdiction over the subject matter of an action wherein a Tribe of Indians seek to

enforce their rights, guaranteed by Federal statutes, against a municipal corporation.

2. In denying injunctive relief to appellants where appellee, a municipal corporation (the State) seeks to deprive appellants of their property; consisting of water rights on the Cowlitz River, land, timber, mineral, hunting, fishing, and navigation rights on the said river, without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

3. In denying relief to appellants who are in a guardian and ward relationship with the United States and whom Congress has singled out as the object of exclusive Federal control in the following Statutes:

(1) Ordinance of 1787 1 Statutes 50 and 51

"The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent".

(2) Oregon Territorial Act 9 Statutes 323 (August 14, 1848)

"* * * nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain Unextinguished by Treaty between the United States and such Indians * * * (See Opinion of Atty. Gen'l 22 June 1885).

(3) Washington Territorial Act March 2, 1853 (10 Stat. 172)

(4) State of Washington Enabling Act 25 Statutes C 180 P. 676 Section 4 (552)

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * * (Emphasis supplied)

(5) Protection of Indians 25 USCA 177

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by Treaty or convention entered into pursuant to the Constitution".

4. In denying appellants relief when appellee's acts interfere with appellants' use of their water rights on said river including interfering with their navigation of said river under Section 401 of the Rivers and Harbors Act (16 USCA) 797, which is also a violation of due process under the 14th Amendment.

/s/ MALCOLM McLEOD,
One of Attorneys for Appellant

[Endorsed]: Filed August 15, 1956. Paul P. O'Brien, Clerk.

SUPREME COURT, U.S.
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 720

COWLITZ TRIBE OF INDIANS, *Petitioner,*

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington
Attorneys for Petitioner.

THE ARGUS PRESS, SEATTLE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

COWLITZ TRIBE OF INDIANS, *Petitioner,*

vs.

THE CITY OF TACOMA, a Municipal Corporation, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MALCOLM S. McLEOD
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Seattle 4, Washington

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Attorneys for Petitioner.

THE ARGUS PRESS, SEATTLE

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Supreme Court of the United States

OCTOBER TERM, 1957

COWLITZ TRIBE OF INDIANS, *Petitioner*,
vs.
THE CITY OF TACOMA, a Municipal Corporation, *Respondent*.
No.....

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The above-named petitioner, by its counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

OPINION BELOW

The judgment below was entered on August 16, 1957 (R. 110). The Petition for Rehearing was denied on October 16th, 1957 (R. 111).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

[1] For another facet of the City of Tacoma in its efforts to build the identical two dams, see Docket No. 509, October, 1957, term, *City of Tacoma v. Taxpayers of Tacoma*, Certiorari granted, December 9, 1957.

STATEMENT OF THE CASE[2]

The Cowlitz Tribe of Indians complained in the United States District Court that it was the owner of and is in the actual occupation of lands, fishing rights, hunting rights, water rights and burial grounds in the Cowlitz River Drainage in the State of Washington, holding the same by virtue of aboriginal possessory rights or original Indian title. The Indians sought to enjoin the City of Tacoma from building two dams on such property.

The City has admitted the building of the dams but

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[2] For the purposes of clarity we are submitting a broad summary of the facts in our Brief. We recognize the need, however, to submit a detailed and documented statement and so submit the following:

The Complaint (R. 3-13) alleged that the Indians owned and possessed in the Cowlitz River Drainage the lands (R. 3, 8), hunting, fishing and water rights (R. 4, 8, 10) and burial grounds (R. 6, 7). The allegations were supported by various affidavits, as to burial grounds (R. 27, 28, 29, 30, 73, 74); as to fishing and hunting rights (R. 28, 30, 40, *et seq.*, 69, 70, 72, 73); as to lands (R. 28, 31, 40, *et seq.*, 70, 72-73).

The answer (R. 13-20) admitted that more than $3,000 was involved (R. 14) and that respondent was building the dams in question (R. 14). Further, it admitted respondent failed to make any arrangements to move the graves (R. 14-15).

The answer further contained eight affirmative defenses (R. 18-20) the first four of which, at this stage of the proceeding, should be noticed. The first is, the Court has no jurisdiction, because Indian-title lands do not confer any rights on the Indians; second, whatever rights the Indians held were long since extinguished by Congress; third, the complaint is not based on a federal question; and, fourth, insufficient facts are stated in the Complaint on which to base a cause of action.

The City served some Requests for admission (R. 84-86) which listed patents from the United States on all the *real estate* which would be inundated by the dams. Among these patents were those issued to the Northern Pacific Railway Company [R. 85, Paragraphs (3) (4) (5)]. The petitioner did not respond to such requests and so the facts therein recited stood admitted.

The City moved for a preliminary hearing on the question of jurisdiction (R. 21-23), which was argued and jurisdiction found wanting and the action dismissed (R. 95).

claimed that the Indians had no rights cognizable at law or in equity. The City moved to dismiss the proceedings because the District Court had no jurisdiction, there being no diversity of citizenship and the Indians having no such property rights entitled to the protection of a Federal Court. The District Court dismissed for lack of jurisdiction (R. 95) and the Court of Appeals for the Ninth Circuit affirmed (R. 107-111).

The Complaint, Answer and Answers to Interrogatories, and unanswered Requests for Admissions, reveal that the Indians are living in the Cowlitz River Drainage, hunting and fishing there now and since time immemorial; that there are burial grounds located there where the ancestors of the Indians were buried. The United States has issued various patents to lands within the Drainage area, including a series of patents to the Northern Pacific Railroad Company. These latter patents are identical to those considered in *United States v. Santa Fe,* 314 U.S. 339 (1941), under an identical statute.[3] The City has acquired record title to all of

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[3] Petitioner is limiting the present discussion to the railroad patents without waiving the right to attack other patents for a later trial on the merits—if such a trial ensue. This thereby abbreviates the record, for petitioner believes if it succeeds in showing any kind of property right in itself, then a trial must be had when the full quantum of its rights may be examined.

The railroad Act involved in *United States v. Santa Fe,* 314 U.S. 339, is 14 Stat. 292, and in the instant case relating to the Northern Pacific Railway Company is 13 Stat. 365. The portion of the two statutes granting lands to the respective railroads (in each instance Sec. 3 thereof) is identical, word for word. There is a slight variation in Sec. 2 with respect to the manner in which the United States should extinguish the rights of the Indians. At this stage of the instant proceeding, we will not extend our discussion of the two statutes, believing that should Certiorari be granted we can then discuss the problem in detail.

Suffice it to say at the moment that " . . . the Warlapai had 'Indian title' which, unless extinguished, survived the railroad grant of 1866.

the *real estate* which will be inundated by acquiring title from such patentees.[4]

STATUTES

So far as the precise point is concerned, there is only the jurisdictional statute of 28 U.S.C. 1331 involved, which reads as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

THE QUESTIONS PRESENTED

Does the Fourteenth Amendment to the United States Constitution confer jurisdiction on Federal Courts to enjoin a municipal corporation in expropriating property held by non-treaty Indians by virtue of "Indian title," sometimes called "aboriginal posses-

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[4] There is nothing in the record to dispute *actual* occupation of fishing, hunting and water rights and burial grounds by the petitioner. As to lands acquired by the respondent from the aforementioned patentees, there is nothing in the record to dispute actual occupation when the patents were issued. However, whether actual occupation still subsists today in a legal sense is a factual question, so far as such patented lands are concerned, which would require a trial on the merits to determine. But petitioner conceives that its burden here is merely to show *some* quantum of property which the city seeks to destroy without compensation, to prevent which, the injunction should issue.

Unquestionably, it has been the policy of the federal government from the beginning to respect the Indians' right of occupancy, which could only be interferred with or terminated by the United States." 314 U.S. 339, 345.

We further believe that since no effort either factually or by way of congressional authority has been made to dispute actual occupation of the fishing, hunting and water rights and burial grounds, that the latter confers sufficient property rights in the Indians to require the Court's intercession for the Indians' protection.

sions." The question is the counterpart to *Tee-Hit-Ton Tribe of Indians v. United States,* 348 U.S. 272, where the Court held that the *United States,* as distinguished from a *municipal corporation,* may so expropriate such property. The necessary corollary of the question is: Is the taking by a *municipal corporation* of lands owned by an Indian Tribe under original Indian title, the taking of a compensable interest in lands for which the municipal corporation is liable?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioner believes that the question presented is one of major importance in the administration of Indian affairs: May a municipal corporation invade with impunity lands occupied by Indians under original Indian title? Included in such a question is, how much dignity does original-Indian-title lands have?

If Certiorari be granted and the Court answers the question directly, non-treaty Indian tribes can utilize the rule to be announced in this case in protecting their property against intrusion by third parties. It will enable them to protect themselves against others than the United States. It will enable such Indian tribe to diminish damages in later suits against the United States where a particular jurisdictional act authorizes damages against the United States for the latter's failure to protect the Indians from other parties.

We think that all will concede that if a municipal corporation seek to usurp private property that the Fourteenth Amendment would confer jurisdiction on a District Court to enjoin the same. That is hornbook

law and is supported by the following authorities: *Portland R. R. Co. v. City of Portland,* 181 Fed. 632, Appeal dismissed, 218 U.S. 686 (Bean, D.J., 1910 CC Ore.); *Iron Mountain, etc., v. City of Memphis* (CCA-6, 1899) at 96 Fed. 113; *Coyahoga River Power Co. v. City of Akron,* 240 U.S. 462 (1916).

The City argues, rather, that original Indian title is of so little dignity that a municipal corporation may oust the Indians at will.

There is no case which directly holds that a District Court has jurisdiction, invoked by an Indian tribe as plaintiff, to enjoin a municipal corporation from lands in actual occupation by Indians under original Indian title.

The respondent and the Court of Appeals relied on *Tee-Hit-Ton v. United States,* 348 U.S. 272, and seek to extend the doctrine that deprivation of Indian title land by the United States to such deprivation by lesser units of government; but the latter is excluded by that case as follows: "As between the Indians and the United States" (Page 279) the disability of the Indians exists, but '* * * (the) right of occupancy * * * the Sovereign * * * protects against intrusion by third parties * * * " which, of course, means parties like the respondent.

The City argues that because the Fifth Amendment does not protect the Indians from expropriation by the United States, that therefore the Fourteenth Amendment does not protect the Indians from expropriation by a municipal corporation.

But the public policy reasons for protecting the United States are not available to a *municipal corporation.*

The United States is the sovereign, the repository and creator of all law, the successor to the Kings of England, Spain, etc. The United States has adopted a policy of dealing with such property, when the United States is the expropriator, as a kindly father would do, and so, we have the Indian Claims Commission Act 28 U.S.C. 70 and the multitude of jurisdictional acts, conferring jurisdiction in the Court of Claims to recompense the Indians, even as to Indian-title lands.

How can the respondent, a municipal corporation, arrogate unto itself the power and dignity of the sovereign to wrest the ancestral home from the Indian?

Where the United States has seen fit to fulfill its duties as guardian, this Court has protected Indian-title lands, *United States v. Santa Fe,* 314 U.S. 339 (1941). But since the United States was a party, no question of jurisdiction could be raised. But we "think" the following phrases "have been so often and so long repeated * * * they should now be considered no longer open." 314 U.S. 339, 346.

Thus, *Minnesota v. Hitchcock,* 185 U.S. 373, 388-9, "Whether * * * a reservation * * * or unceded Indian country, * * * *the Indians' right of occupancy has always been held to be sacred;* something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Cherokee Nation v. Georgia,* 5 Pet. 1: " * * * *unquestioned right to the lands they occupy,* until * * * extinguished by a voluntary cession to our government; * * * " (p. 17). "Indians have rights of occupancy * * * *as sacred as the fee-simple,* absolute title of the whites; * * * " (p. 48).

Worcester v. Georgia, 6 Pet. 515, 557: " * * * a right to all the lands within (their territorial) boundaries, which is not only acknowledged, but guaranteed by the United States" (p. 557). *Mitchel v. United States*, 9 Pet. 711, 745-746: " * * * owning them by a perpetual right of possession in the tribe * * * (which, though fee was in the crown) could not be taken without their consent * * * their right of occupancy is considered as sacred as the fee-simple of the whites." *Leavenworth Railroad v. United States*, 92 U.S. 733, 742: " * * * unquestionable right to the lands they occupy, until * * * extinguished by a voluntary cession * * * This perpetual right of occupancy, with the correlative obligation of the government to enforce it. * * * " *United States v. Cook*, 19 Wall. 591, 593: " * * * right of Indians to their occupancy is as sacred as that of the United States to the fee, * * *." *United States as Guardian, etc., v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, and *Cramer v. United States*, 261 U.S. 219, 227: "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy * * *." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 48: "It was the usual policy not to coerce the surrender of lands without consent and without compensation * * * Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States v. Alcea Band*, 329 U.S. 49, 91 L.ed. 29, "As against any but the sovereign, original Indian title was accorded the protection of complete ownership" (p. 33). *Tee-hit-ton Tribe v. United States*, 348 U.S. 272, 99 L.ed.: "This is not a property right but amounts to a right of occupancy

which the sovereign grants and *protects against intrusion by third parties* * * * " (p. 320-21). *United States v. Santa Fe*, 314 U.S. 339, 342: "This Court has continuously recognized that aboriginal possession creates a possessory right *legally enforceable against everyone* except the United States." (p. 345)

Once we get past the hurdle that original-Indian-title lands are property, then it follows axiomatically that the Federal Courts have original jurisdiction under the Fourteenth Amendment to enjoin a municipal corporation destroying such property.

Petitioner believes that the primary question should be answered by this Court directly and is so plain, we think, that a Writ of Certiorari should be granted, the case transferred to the Summary Docket and the case reversed.

WHEREFORE, petitioner prays that a Writ of Certiorari issue to review the decision below, the cause to be transferred to the summary docket and the judgment below reversed and the cause remanded to the trial court for a trial on the merits.

Respectfully submitted,

Malcolm Stewart McLeod

MALCOLM STEWART MCLEOD
Attorney for Petitioner.

FREDERICK PAUL,
JAMES E. SAREAULT,
of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant,*
vs.
CITY OF TACOMA, a municipal corporation, *Appellee.*
No. 15211

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, May 6, 1957
Before: HEALY, FEE and HAMLEY, Circuit Judges

ORDER OF SUBMISSION

ORDERED appeal herein argued by Mr. Malcolm S. McLeod, Mr. James E. Sareault and Mr. Frederick Paul, counsel for appellant, and by Mr. Marshall McCormick, counsel for appellee, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, August 16, 1957
Before; HEALY, FEE and HAMLEY, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant*,
vs.
CITY OF TACOMA, a municipal corporation, *Appellee*.

No. 15211
Aug. 16, 1957

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Before: HEALY, FEE and HAMLEY, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

An action has been brought by the Cowlitz Tribe of Indians for damages and for an injunction against the City of Tacoma, to enjoin the latter from constructing two dams on the Cowlitz River and from selling any bonds in connection therewith. The essential basis of the claim of the Tribe is that the aboriginal title to all the real property used in construction of the proposed Mayfield and Mossyrock dams has never been extinguished. The Tribe claims fee simple title to all the lands at the sites and the property in all the waters of the Cowlitz. It is also alleged that fishing rights of the Tribe are and will be interfered with and that burial grounds of its ancients will be desecrated.

The City raised the question of jurisdiction in its answer. The Tribe answered a series of interrogatories by the City, but failed to respond to a request for admissions as to the genuineness of documents. The Tribe also filed several affidavits in support of its claim.

The trial court held a preliminary hearing to determine the affirmative defenses set out in the answer.[1] It considered the evidence, records and files in the case, in-

[1] See Federal Rules of Civil Procedure, Rule 12(d).

cluding the affidavits and exhibits. The District Court then dismissed for want of jurisdiction of the subject matter. The Tribe has appealed from this judgment.

The claim of the Tribe is that, while original title of other Indian tribes to land and water in the State of Washington was extinguished by treaty, the Cowlitz Tribe entered into no treaty. It is contended that the City is appropriating this real property in which the Indian title still subsists, and therefore just compensation must be paid. It is said this raises a federal question and that more than the jurisdictional amount is involved. Therefore, the District Court had jurisdiction, according to the contention presented on appeal.

The Tribe is presently prosecuting a proceeding against the United States under the provisions of the Indian Claims Act, wherein there is claimed all of the lands and rights in several counties and parts of counties of the State of Washington belonged to the Tribe, and that the United States has deprived them thereof.[2] The answer of the government is that the Tribe has no rights therein and the claim should be denied under Duwamish Tribe of Indians vs. United States, 79 Ct. Cls. 530, cert. den., 295 U.S. 755.[3] It is thus clear that the question is political and not justiciable. It would be otherwise if the government, as guardian and protector of these Indians, were bringing action for an invasion of the aboriginal title vested in them and recognized by the United States against trespassers or adverse claimants, even though the latter might hold grants from the government. United States vs. Santa Fe Pacific Railroad Co., 314 U.S. 339.

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[2] Simon Plamondon, on relation of the Cowlitz Tribe of Indians vs. United States, Indian Claims Commission, Petition No. 218, filed August 8, 1951.

[3] See also Tee-Hit-Ton Indians vs. United States, 348 U.S. 272, 285, reh. den., 348 U.S. 965.

The limitations of the jurisdiction of the District Court must be observed. Here neither diversity of citizenship nor a jurisdictional amount has been alleged. There is on the face of the pleading no federal question. The United States is not a party, as it was in the Santa Fe case. Here the Tribe does not allege that the United States has ever recognized any title in these Indians, either collectively or individually, by congressional action or by executive order. The primary question in a condemnation action is compensation for the title. The Cowlitz did not enter into any treaty with the government, so the construction of no such instrument is involved.

As a matter of history of which the District Court could take judicial notice, the United States did occupy all this territory, as sovereign and possessor, and has acted as the proprietor or grantor of all the lands involved for a century. The government has granted numerous parcels of these lands to private individuals, school districts and corporations. The City of Tacoma is successor to certain of these grantees. Part of the lands are in forest reserve. The City of Tacoma, as to the water to be impounded, is acting under license from the Federal Power Commission.

The controversy therefore does not arise under the Constitution, Treaties or any law of the United States. The trial court had no jurisdiction.

The appeal is dismissed.

(Endorsed:) Opinion. Filed Aug. 16, 1957.
Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant*, vs. CITY OF TACOMA, a municipal corporation, *Appellee*.	No. 15211

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment.

Filed and entered August 16, 1957.

PAUL P. O'BRIEN, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant*, vs. CITY OF TACOMA, a municipal corporation, *Appellee*.	No. 15211

UPON PETITION FOR REHEARING

Before: HEALY, FEE and HAMLEY, Circuit Judges

Appellant misconstrues the opinion of this Court. The decisive point is that the District Court had no jurisdiction of the alleged cause. The history was noticed as illustrative.

The petition for rehearing is denied.

(ENDORSED)

Filed October 16, 1957.

PAUL P. O'BRIEN, Clerk.

SUPREME COURT. U. S.

FILED
FEB 6 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 720

COWLITZ TRIBE OF INDIANS, *Petitioner*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

COWLITZ TRIBE OF INDIANS, *Petitioner*, vs. THE CITY OF TACOMA, a Municipal Corporation, *Respondent*,	No. 720

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondents pray that petitioner's Petition for Writ of Certiorari be denied for the reason that no Federal question exists in this case to invoke the jurisdiction of the U. S. Supreme Court, as the matter in controversy does not arise under the constitution, laws or treaties of the United States, and the question is political and not justiciable (Pet. App. pp. 13-14).

RESTATEMENT OF THE CASE

For the purpose of clarity, respondent sets forth briefly its statement of the case.

The petitioner, as a tribe, brought suit in the United States District Court to enjoin the construction by the respondent of two dams upon the Cowlitz River in Lewis County, Washington, and to prevent the selling of any bonds in connection therewith, and for monetary damages.

In its Complaint, petitioner sets forth four separate causes of action (R. 3-13. All are based solely upon petitioner's claimed aboriginal or Indian title. No contract or treaty whatever with the United States is alleged or involved. Petitioner's sole contention therein is that it has title to all of the property and rights involved superior to that of the respondent and respondent's predecessors in title, including the original patentees and grantees from the U. S. Government. The action, in essence, was to try title to this property and these property rights in a Federal Court.

The respondent, in its Answer, admits that it is proceeding to build the dams in question under a license issued by the Federal Power Commission, being Project No. 2016, on November 27, 1951, under the Federal Power Act (16 USCA 791 (a) through 823), and has purchased and is purchasing necessary lands and rights in connection therewith from the record title owners thereof (R 13-17).

The respondent in its Answer also sets up three separately stated jurisdictional defenses determinable in a preliminary hearing under Rule 12(d) of the Federal Rules of Civil Procedure (R. 17-18). Briefly these are:

(1) In the absence of congressional recognition of Indian title and specific authorization for the petitioner to sue, the petitioner's only recourse is the prosecution of its claim which it has filed against the government under the Indian Claims Act, 60 Stat. 1050 et seq. Public Law No. 726, 79th Congress (R. 17);

(2) Any rights the petitioner may have had have been extinguished by Congress by the issuance of patents, conveyances and grants (R. 17-18); and

(3) The Complaint does not show on its face that a Federal question is involved. On the contrary, the issues as shown involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the courts of the State of Washington have exclusive and original jurisdiction (R. 18).

As set forth in Exhibit 1 attached to respondent's Answer (R.17 and 84-85), the United States occupied all of the territory in question as sovereign and possessor, has acted as the proprietor or grantor of all lands involved, and has granted and conveyed to respondent's predecessors in title, under acts of Congress, all of the lands and rights involved herein (Pet. App. 14[1]; R. 17).

In a preliminary hearing on these jurisdictional defenses the U. S. District Court, after considering the evidence and files and the affidavits and exhibits in this case, dismissed the action for lack of jurisdiction (R. 95-96). The Court of Appeals for the Ninth Circuit affirmed on the grounds that "the controversy therefore does not arise under the Constitution, Treaties or any law of the United States." (Pet. App. 14).

Petition for Rehearing was denied (Pet. App. 16), and Petition for Writ of Certiorari to this court followed.

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[1]The Court of Appeals in its opinion in this case stated:

"As a matter of history of which the District Court could take judicial notice, the United States did occupy all this territory, as sovereign and possessor, and has acted as the proprietor or grantor of all the lands involved for a century. The government has granted numerous parcels of these lands to private individuals, school districts and corporations. The City of Tacoma is successor to certain of these grantees. Part of the lands are in forest reserve. The City of Tacoma, as to the water to be impounded, is acting under license from the Federal Power Commission."

RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

The question as stated by petitioner does not accurately and fairly present the question involved. (Pet. 4). The question presented is as follows:

> "Does the Complaint in this action show, on its face, by a statement of legal and logical facts, that this suit is one which really and substantially involves a controversy arising under the Constitution, treaties or laws of the United States upon which this Court can base jurisdiction?"

REASONS FOR DENYING WRIT

FEDERAL DISTRICT COURTS ARE COURTS OF LIMITED JURISDICTION

It is universally conceded that the Federal District Courts are courts of limited jurisdiction, and their powers and duties depend solely upon the acts which call them into existence or subsequent acts which extend or limit their jurisdiction. 54 Am. Jur., Sec. 6, p. 665; 54 ALR Sec. 10, p. 671; 1 Barron & Holtzoff, Fed. Practice & Procedure, Sec. 21, p. 39.

The Complaint must show, by a statement of facts in legal and logical form, that the suit is one which really and substantially involves a controversy based on the construction of or application of the Constitution or some law or treaty of the United States, and the allegations of the Complaint cannot be helped out by resort to the other pleadings or by judicial notice. 54 Am. Jur. Sec. 53, p. 707 and Sec. 140 p. 771.

When the controversy is over rights in real property, such as here, the fact that titles involved may have emanated from the Federal Government or the con-

troversy involves construction of Federal statutes, does not vest the Federal District Court with jurisdiction in the matter.[2]

These principles of law are also enunciated in the decisions of the United States Supreme Court.

In *Shulthis vs. McDougal*, 225 U.S. 561, 56 L. Ed. 1205, the Court on page 1211 states:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws. * * *" [3]

Under the principles of law above set forth, it is obvious the Complaint in this action is fatally defective in that it fails to state facts sufficient to show that a real and substantial Federal question is involved upon which jurisdiction can be based.

---

[2] In 42 Am Jur., Sec 70, p. 846, it is stated:

> "It is the rule that the courts of a state must determine the validity of titles to land lying in the state, although such titles emanated from the Federal Government or the controversy involves construction of Federal statutes, and they can determine between individuals the priority or validity of conflicting titles under different grants from the same antecedent source. * * *"

[3] In accord see *Taylor vs. Smith*, 167 Fed. (2d) 797; *Shoshone Mining Co. vs. Rutter*, 177 U. S. 505, 44 L. Ed. 845 (865);

Little York Gold-Washing & Water Co. vs. Keyes, 96 U. S 199 (203) 24 L. Ed. 656 (658)

INDIAN TITLE IS NOT A PROPERTY RIGHT SUFFICIENT TO INVOKE THE JURISDICTION OF THE FEDERAL COURT UNDER THE "DUE PROCESS" CLAUSES OF THE CONSTITUTION

The claims of the petitioner are based solely upon its claimed aboriginal or Indian title (Pet. App. 9). Such rights are not those rights coming under the protection of the "due process" clauses of the Constitution. Aboriginal or Indian title is a mere right of occupancy and is not a vested property right (27 Am. Jur., Sec. 24, p. 555), and the extinguishment of Indian title is entirely a question of governmental policy and is not open to contestation in judicial tribunals (27 Am. Jur., Sec. 33, p. 561). (Pet. App. 13)

The Federal Courts have in many cases decided and discussed various issues involving property rights of Indians. Two of these cases have exhaustively analyzed and defined aboriginal or Indian title and have reconciled and interpreted many, if not the great majority, of the important cases dealing with these rights. These cases are:

(1) *Duwamish et al Indians vs. United States*, 79 Ct. Cls. 530 (Cert. denied, 295 US 755), which was decided June 4, 1934; and

(2) *Tee-Hit-Ton Indians vs. United States*, 348 US 272, 99 L. Ed. 314, which was decided February 7, 1955, on a Writ of Certiorari to review a judgment of the United States Court of Claims (128 Ct. Cls. 82; 120 F. Supp. 202).

In the *Duwamish case, supra*, action was brought in the United States Court of Claims under the authority of 43 Stat. 886, Chapter 214, by nineteen Indian tribes as plaintiffs five of whom were nontreaty Indians, as

here. Plaintiff tribes sought to recover damages for the alleged value of land thrown open to public settlement by Congress. The Court, speaking on the necessity of governmental recognition of Indian title in order to base any rights theron sufficient to give the courts jurisdiction, stated on pages 602 and 603 as follows:

> "We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction (*Mille Lac Indian case, supra*), and the issue is a political and not a judicial one."[*]

The *Tee-Hit-Ton case, supra*, is a recent case wherein this Court again reiterated the principles laid down in the *Duwamish case, supra*, and held that the manner, method and time of the extinguishment of Indian title raise political and not justiciable issues, and the Federal courts have no jurisdiction in the matter.

This action was brought by the plaintiff under the Fifth Amendment to recover compensation for the taking of timber from private lands, the plaintiff, as here, basing its claims on aboriginal or Indian title.

[*]The Court, in the Duwamish case, at pages 598-600, stated:

> "* * * Tribal Indians claimed by right of occupancy such vast and unlimited areas of lands, encompassing in many instances the greater and better portions of what are now States of the Union, that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts upon the subject."

The United States Court of Claims denied compensation to the plaintiff Indians, and this Court affirmed the judgment of the Court of Claims. This Court, in summing up the relationship between the United States and the Indians in respect to their rights in lands, stated on page 326 (L. Ed.) as follows:

> "In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle."[5]

[5]The Court stated on page 320 "Indian Title" is defined as follows:

> "*Indian Title.* * * * That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. *This is not a property right* but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. (Italics ours.)

On page 321, in recognizing the supreme power of Congress over such lands, the Court stated as follows:

> "In 1941 a unanimous Court wrote, concerning Indian title, the following.
>
> "'*Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues.*' *United States v. Sante Fe Pacific R. Co.*, 314 US 339, 347, 86 L. Ed. 260, 270, 62 S Ct 248." (Italics ours.)

Other United States agencies are in accord. In Footnote 21, p. 325

There can be no argument that under the principles laid down in the above cases, Indian title is not such a property right, having never been recognized in the petitioner by Congress sufficient to vest jurisdiction in the Federal courts in this instance; and on this basis alone the Petition for Writ of Certiorari by the petitioner should be denied.

NO FEDERAL QUESTION EXISTS, FOR THE REASON THAT ANY RIGHTS THAT THE PETITIONER MAY EVER HAVE HAD IN THE LANDS IN QUESTION HAVE BEEN EXTINGUISHED BY ACTS OF CONGRESS

The United States had paramount title to all lands and rights claimed by the petitioner, and has conveyed that title and those rights to third parties by the issu-

---

of this case, in defining Indian or aboriginal title by several government agencies, it is stated:

"The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on HR 1921, 83d Cong.—Sess.

"*Department of Interior*: 'That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when United States v. Alcea Band of Tillamooks, 341 US 48, 95 L. Ed. 738, 71 S Ct 552 (1951) was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy *was not a taking within the meaning of the fifth amendment* entitling the dispossessed to just compensation. (Italics ours.)

"'Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, *they cannot be regarded as clouds upon title in the ordinary sense of the word.* * * *'" (Italics ours.)

"*Department of Agriculture*: 'We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. * * *'

"*Department of Justice*: 'Thus, there is no legal or equitable basis for claims or rights allegedly arising from "aboriginal occupancy or title."'"

ance of patents or grants or conveyances. Thus all rights that the petitioner may have ever had in said lands have been extinguished by the United States, no Federal question exists, and petitioner's remedy is in the United States Court of Claims, where it now has pending its claim for damages for the taking of such lands by the United States Government (R 17-19, 84-86).

The United States, by the issuance of these patents and grants, not only has extinguished all rights that the petitioner may have had in such lands, but also has divested itself of all title and rights in the land conveyed. 42 Am. Jur., Sec. 31, p. 811, and Sec. 32, p. 812.

This Court, in *United States vs. Alcea Band*, 329 US 40, 91 L. Ed. 29, on page 35 (L. Ed.) clearly and concisely sets forth this principle as follows:

> "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. *Termination of the right by sovereign action was complete and left the land free and clear of Indian claims.* Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title * * *" (Italics ours.)"

"See also in accord 42 Am. Jur., Sec. 35, p. 814 and 815, and *U. S. vs. Minnesota*, 270 U. S. 181, 70 L. Ed. 539, and *Menominee Tribe of Indians case*, 95 Ct. Cl. 232, where the effect of the issuance of a patent by the United States Government is ably discussed.

Respondent submits that any rights the petitioner may have had in any lands here in question have been extinguished by the issuance of the patents and grants set forth in respondent's Second Defense in its Answer (R. 17-18), and therefore the petitioner has no property rights under any constitutional provisions upon which the District Court could base jurisdiction.

ANY RIGHTS THAT THE PETITIONER MAY NOW HAVE HAVE BEEN DIVESTED AND ARE EXCLUSIVELY CONTROLLED BY THE FEDERAL POWER ACT

Not only have all rights that the petitioner may have ever had been extinguished by Congressional acts, but also any remaining rights which petitioner may conceivably claim at the present time in these lands involved are wholly and completely subject to disposition by the Federal Government under the Federal Power Act, 16 USCA, Sec. 791 to 825r. Section 818 thereof specifically provides that from the date of the filing of the application for license, all lands owned by the Government and included in any proposed project shall be withdrawn from other disposal. It is obvious, therefore, that petitioner's claims, if any, are subject to the exclusive disposal and extinguished thereof by the Federal Government under the terms of the Federal Power Act.

This power has been recognized by the Supreme Court of the State of Washington in *Tacoma vs. Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214.[7]

[7]The Supreme Court of Washington, on page 481 of its opinion, states:

"* * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense

FEDERAL COURTS HAVE NO JURISDICTION TO DETERMINE TITLE AND RIGHTS IN LAND BETWEEN CITIZENS OF THE SAME STATE, AS THE STATE COURTS HAVE EXCLUSIVE JURISDICTION IN SUCH CASES

The United States District Court has no jurisdiction to try the title to lands and rights in lands as between the petitioner and respondent.

Both parties to this action are citizens of the State of Washington. This action involves simply and solely questions as to the title and rights in lands all located in Lewis County, Washington (R. 84-86). The petitioner is in no better position than any other citizen of the State of Washington, and must bring its action involving these lands against the respondent in Lewis County, in accordance with RCW 4.12.010.*

The Federal courts at all times are vigilant so as not

*RCW 4.12.010 provides as follows:

"Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

"(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property. * * *"

---

private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

Again on page 498 it is stated:

"* * * On the authority of those decisions, we must hold that Congress had the constitutional power to enact the Federal power act and that, in doing so, it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper."

to infringe upon the State courts' jurisdiction and rights.

In *Square D Co. vs. United Electrical, Radio & Machine Workers of America*, 123 Fed. Supp. 776, the Court states on page 781(3) as follows:

> "Preservation of our federal system required the federal courts to give due regard to the rightful independence of state governments by scrupulously confining their own jurisdiction to precise limits defined by statute. *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1248; *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 67, 62 S. Ct. 15, 86 L. Ed. 47; *Cf. Silverton v. Rich*, D.C. Cal. 1954, 119 F. Supp. 434."

In accord see also *Parissi v. General Electric Co.*, 97 F. Supp. 333 ([4] page 335); and *Farson v. City of Chicago*, 134 F. 184, (pages 186 and 187).

ARGUMENT IN ANSWER TO PETITIONER

Petitioner bases jurisdiction of this court upon the provision of 28 U.S.C. 1331 (Pet. 4). Obviously, therefore, the sole question for the consideration of the Court is whether the matters here in controversy arise under the Constitution, laws or treaties of the United States.

It is admitted that no treaties are involved (Pet. 5).

Petitioner, in its statement of "the question presented," limits the consideration of the Court to the precise question of whether or not the matters here in controversy arise under the Fourteenth Amendment to the Constitution of the United States (Pet. 4-5).

The petitioner makes the naked assertion that because private vested property rights are protected under the "due process clauses" of the Constitution, the determination of the rights as claimed in petitioner's Complaint, under aboriginal or Indian title, also involve a controversy arising under the Constitution of the United States and of which the Federal courts have jurisdiction (Pet. 5-6).

In support of this, petitioner cites three cases.[9]

All three of these cases involved properties and rights universally recognized as vested property over which there could be no question as to the jurisdiction of the Federal courts. These cases have no bearing whatsoever upon the jurisdictional question involved here.

The fallacy of the entire argument of the petitioner is that it assumes as true that which is in dispute; that is, that its rights under Indian title as alleged in its Complaint are vested property rights and therefore within the protection of the Fourteenth Amendment to the Constitution. The undisputed facts are that petitioner's rights under Indian title, have never been recognized by any treaty or any acts of Congress, and none exist. Furthermore, any rights that the petitioner may ever have had were extinguished long ago by the issuance of patents and grants authorized by acts of Congress (R. 17-18, Exhibit 1; 84-86) (Pet. App. 14).

[9] *Portland R.R. Co. v. City of Portland*, 181 Fed. 632, Appeal dismissed, 218 U.S. 686 (Bean, D.J., 1910 CC Ore.); *Iron Mountain, etc., v. City of Memphis* (CCA-6, 1899) at 96 Fed. 113; *Coyahoga River Power Co. v. City of Akron*, 240 U.S. 462 (1916).

In its petition before the Indian Claims Commission of the United States (No. 218), which was verified under oath and which is still pending and which covers all of the properties and rights herein involved, the petitioner admits that it had been deprived of all of its lands and rights therein by the United States.[10]

Furthermore, any rights that petitioner may conceivably have at the present time in any of these lands involved are wholly and completely subject to disposition by the Federal Government and under its control by the provisions of the Federal Power Act, 16 USCA, Sec. 791-825r (Sec. 818).

[10]Paragraph IV of the Petition states in part;

"* * * No further effort was made by the United States after said council meeting terminated March 2, '855, to treat with said tribe, but the United States continued to encourage the settlement of the lands of said tribe by American settlers, made numerous grants of land to such settlers out of the lands of said tribe and forcibly removed the Cowlitz Indians from their lands, all without compensation to said tribe and its members."

In Paragraph VI the Petition further alleges:

"Much of the timber on the lands of the Cowlitz Tribe of Indians has been cut and removed by the United States and its citizens and by the State of Washington and its citizens and millions of dollars have been received therefrom. The fur-bearing and big game animals which abounded in the area have been killed and destroyed by the white hunter. The Cowlitz River and other streams referred to in paragraph III have been depleted of their fish by the commercial and sport fishing of the white man. The kammas grounds have been despoiled. All of the foregoing acts deprived said tribe of their lands and their value and also of the right to take from the forests, streams and the land those things necessary to their living, and reduced said tribe and its members to a condition of extreme poverty and want. That no payment has ever been made by the United States to said tribe for the taking of its lands, nor for depriving said tribe and its members of the right to occupy the same and of the right to hunt and fish in the accustomed way and in the customary places and to gather food and berries, all of which are of great value. *That the doing of the foregoing acts by the United States, all of which were done against the will of said tribe* and without payment of compensation to said tribe, was and is unconscionable." (Italics ours.)

Petitioner cites *U. S. Santa Fe Railway Co.*, 314 U.S. 339 (Pet. 9) as authority upon which this Court must take jurisdiction of this case. The obvious distinction between that case and this is well stated in the opinion of the Circuit Court of Appeals for the Ninth Circuit, as follows:

> "* * * There is on the face of the pleading no Federal question. The United States is not a party, as it was in the Santa Fe case. Here the Tribe does not allege that the United States has ever recognized any title in these Indians, either collectively or individually, by congressional action or by executive order. The primary question in a condemnation action is compensation for the title. The Cowlitz did not enter into any treaty with the government, so the construction of no such instrument is involved." (Pet. App. 14).

It is apparent, therefore, that the petitioner, under its Indian title as alleged, has no property rights involved herein coming under the protection of the Fourteenth Amendment to the Constitution. The issues involved herein are political and not judicial and the Court has no jurisdiction.

Respondent respectfully submits that the petitioner, has no vested property rights within the protection of the "due process clauses" of the Constitution upon which any Federal court can base jurisdiction. The petitioner's exclusive remedy is before the Indian Claims Commission, where it now has pending its claim against the U. S. Government for the extinguishment of such rights as alleged therein.

CONCLUSION

The decisions of the lower courts were correct, and the petitioner's Petition for Writ of Certiorari should be denied on the grounds of lack of jurisdiction for the following reasons:

1. There is no Congressional recognition of any title or rights whatsoever in the petitioner to any of the lands or rights involved.

2. The issues raised herein are political and not judicial.

3. The allegations of the Complaint do not show that this action is one within the jurisdiction of the Federal courts. The naked assertion that a Federal question is involved is not sufficient.

4. Any rights the petitioner may have ever had in the past were extinguished years ago by the issuance of patents and grants authorized by acts of Congress, (R. 22, 84-86). Any remaining land or rights in this project were extinguished and terminated by the granting of a license to the respondent to build these dams under the authority of the Federal Power Act, supra.

5. The Congress of the United States has specifically granted to the petitioner and all other Indian tribes an exclusive remedy before the Indian Claims Commission, which course the petitioner is now pursuing (R. Exhibits 2 and 3 attached to respondent's Answer, p. 17).

6. The State courts have exclusive and original jurisdiction over controversies between its citizens involving title and rights to land within said state.

Respectfully submitted,

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MAR 21 1958
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In the Supreme Court of the United States

October Term 1957

COWLITZ TRIBE OF INDIANS,
Petitioner,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent.

No. 720

PETITION FOR REHEARING ON PETITION FOR CERTIORARI

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THE CITY OF TACOMA, a Municipal Corporation,
Respondent.

No. 720

PETITION FOR REHEARING ON PETITION FOR CERTIORARI

Now comes the petitioner, by its counsel, and prays for a rehearing.

An action was brought by your petitioner, the Cowlitz Tribe of Indians, for an injunction against the City of Tacoma, to enjoin the latter from constructing two dams on the Cowlitz River. The essential basis of the claim of your petitioner is that it is in actual occupation of certain lands and waters from time immemorial (which the respondent admits by its failure

to traverse) which occupation will be destroyed if the respondent is allowed to construct the said dams; that this dispossession by respondent is without due process of law; and in violation of the Fourteenth Amendment to the Constitution of the United States; and that the title of your petitioner is "original Indian title" and comes under the protection of the said Fourteenth Amendment.

The respondent says that it is the successor to the special grants by Congress to the Northern Pacific Railroad Company under four Acts (13 Stat. 365, 16 Stat. 378, 30 Stat. 597 and 34 Stat. 197), and that your petitioner stands in the shoes of the United States and is immune from legal action, hence the constitutional courts of the United States are without jurisdiction.

The Court of Appeals, Ninth Circuit, in a restatement of its opinion, said,

> "The decisive point is that the District Court has no jurisdiction of the alleged cause."

Petition for a writ of certiorari was denied by this court.

This petition for a rehearing should be granted because:

(1) the property rights of many thousands of non-treaty Indians are based on their present and actual

occupation of lands which began from time immemorial to the present day, a title commonly known as "original Indian title";

(2) that to refuse to grant this petition will, in effect be, to reverse the opinions of this court beginning with *Johnson vs. McIntosh*, 8 Wheaton 543; *Beecher v. Wetherby*, 95 U.S. 517, and subsequent cases where the parties asserting a paramount right to dispossess non-treaty Indians did not include the United States.

The respondent's defense is the following:

(1) "any rights the petitioner may have had have been extinguished by Congress by the issuance of patents, conveyances and grants" such as to the Northern Pacific Railroad Company, and so (2) the petitioner's "only recourse is the prosecution of its claim * * * against the government under the Indian Claims Act;" and finally, since the issues relate "solely (to) the title and rights to land located wholly within" the State of Washington, "the courts of the State of Washington have exclusive and original jurisdiction." (This decision is contrary to this Court's holding in *U.S. v. Sante Fe and Pacific Railroad* (314 U.S. at page 354.)

The Court of Appeals seems to have denied jurisdiction because of at least two flagrant errors, one of fact and the other of law. It held:

(1) that there was no allegation that the values in-

volved exceeded the jurisdictional sum of $3,000. In its own summation of the complaint, the Court said "more than the jurisdictional amount is involved" while narrating two paragraphs later it said that "neither diversity of citizenship NOR a jurisdictional amount has been alleged," overlooking paragraph IV of the complaint as well as the Court's own summation.

(2) the Court gave probative force amounting to *res adjudicata* to the answer of the United States filed by the petitioner in a totally different court, which answer included the following:

> "the Tribe has no rights therein and the claim should be denied under the *Duwamish Tribe of Indians vs. United States*, 79 Ct. Cls. 530, cert. den., 295 U.S. 755." (This case has been overruled by the Court of Claims and Indian Claims Commission in *Chehalis vs. U.S.A.*, 155 Fed. Supp. 226, at page 228, *Muckleshoot vs. U.S.A.*, 2 Ind. Cl. Com. 424.)

following which words, the Court of Appeals said:

> "it is thus clear that the question is political and not justiciable."

It would be astonishing doctrine if any court could support its opinion by citing an allegation of either a plaintiff or a defendant from the pleadings in a case yet pending in some other court. Counsel requests this court take notice of it.

The court below said in its opinion, "The primary question in a condemnation action is compensation

for the title." This your petitioner will not deny. But this is not a condemnation case. Your petitioner does not wish to lose its property without due process of law, and so denies the right of respondent to destroy the property of your petitioner even for a public purpose under a claim that petitioner has no recourse either against the United States or respondent since it claims to have procured the immunity of the United States through its grantees.

THE ARGUMENT OF PETITIONER

Land occupied by non-treaty Indians under "original Indian title" is property, and the citation used by respondent taken from the *Tee-Hit-Ton v. United States* case (384 U.S. 272), which is a 5th Amendment case, to-wit:

> "This (actual occupancy) is not a property right, but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties"

must be read in the light of all the many pronouncements of this court on this question. For one thing, the respondent is a third party, and cannot avail itself of defenses available to the United States against a claim based on the 5th Amendment because your petitioner's claim is based on the 14th Amendment against a taking without due process of law.

In the *Mitchell v. United States* case (9 Pet. 711,

746) this court said:

> "Indian * * * hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way * * * as much respected."
>
> "That by the law of nations, the inhabitants * * * retain all the rights of property which have not been taken from them by the orders of the conqueror." (Mitchell case *supra*)

In the case of *Soulard v. United States*, 4 Pet. 511, 512-513, this court defined the word "property" thus:

> "The term 'property' as applied to lands comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed. In this respect the relation of the inhabitants (of the Territory of Louisiana under the treaty of purchase) is not changed."

and so, petitioner holds that "the Indians were considered as owning (the lands they occupied) as their common property." *Mitchell v. United States, supra.*

TWO SIMILAR CASES

In *Beecher v. Wetherby*, 95 U.S. 517, a tract of land which the United States had expressly permitted the Indians to occupy was later expressly conveyed by the United States to the State of Wisconsin, after which, a dispute arose as to the right of Wisconsin

to convey timber land occupied by the Indians. This court said:

> "the Grantee (Wisconsin) * * * would take only the naked fee, and could not disturb the occupancy of the Indians; that the occupancy could only be interfered with or determined by the United States."

The *Wetherby* case is like the current one in this, (1) the occupation by the Indians was by permission of the United States; (2) the fee to the land was in the non-Indians who sought to dispossess the Indians whose only title was "original Indian title," *i.e.* actual occupation. The court held that subject to the right of occupancy by the Indians, the fee was in Wisconsin. And so it would be with Northern Pacific Railroad Company, and when it conveyed its rights to respondent, it would convey only what it had, to-wit: the naked fee. The language of the *Hualapai* case describes extinguishment of Indian title as follows:

> "This court has consistently held that, in the absence of express language to the contrary, a Federal grant of public land does not constitute an extinguishment of Indian occupancy right." 314 U.S. 339.

In the Hualapai Indian case (*U.S. v. Sante Fe and Pacific Railroad*, 314 U.S. 339) the United States expressly conveyed the land in question to the Railroad Company. In an identical statute, the United

States conveyed the land in litigation to the Northern Pacific Railroad Co., who in turn conveyed its rights to the respondent. (1) In both cases, the title rests on an identical act of Congress; both titles were of many years standing; in both cases the original grantee had conveyed its rights to the defendants in each case; in both cases, the title of the Indians was merely "original Indian title" *i.e.*, actual occupation; the Hualapai Indians prevailed as should the Cowlitz tribe.

The respondent, as an inferior appendage of the State of Washington, is bound by the disclaimer exacted from Washington Territory in the Enabling Act; Clause 25 Statutes, C180, p. 676, Section 4 Ss 2:

> "That the people inhabiting said proposed State do agree and declare that they *forever disclaim all right and title* to. . . *all lands lying within said limits owned or held by any Indian* or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian Lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." (Emphasis supplied) same as Art. XXVI Wn. State Constitution.

A similar disclaimer was exacted by the Congress of the United States, when the Oregon Territory was created, 9 Statutes 323:

> ". . . nothing in this Act contained shall be construed to impair the rights of person or property

now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by Treaty between the United States and such Indians. . . ." (see Opinion of U. S. Atty. Genl. 22 June 1885).

We submit that the facts and the law cited above entitle your petitioners to a rehearing in order that the basic law of "original Indian title" might not be reversed by negation unless, of course, that is the result this Honorable Court desires.

Respectfully submitted,

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CERTIFICATE

I certify that the foregoing petition is presented in good faith and not for delay.

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